SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 422

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS

vs.

ILLINOIS CENTRAL RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

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File No. 38,025. Delaware, D.C.U.S.

Term no. 422

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

Filed September 1, 1933. File no. 422 O.T. 1933

1 [*Caption omitted.*]

No. 1012 in Equity

In United States District Court, District of Delaware

ILLINOIS CENTRAL RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD Company, The Chicago Rock Island and Pacific Railway Company, (J. M. Kurn and John G. Lonsdale, Receivers), St. Louis Southwestern Railway Company, The Kansas City Southern Railway Company, Chicago and Eastern Illinois Railway Company, Southern Railway Company, Louisville and Nashville Railroad Company, The New York Central Railroad Company, The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, Lehigh Valley Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, Reading Company, The Central Railroad of New Jersey, New York, Ontario and Western Railway Company, The Delaware and Hudson Company, The New York, New Haven and Hartford Railroad Company, Boston and Maine Railroad, The Chesapeake and Ohio Railway Company, Norfolk and Western Railway Company, Grand Trunk Western Railway Company, Wabash Railway Company, (Walter S. Franklin and Frank C. Nicodemus, Jr., Receivers), Pere Marquette Railway Company, The New York, Chicago and St. Louis Railroad Company, The Ann Arbor Railroad Company, The Akron, Canton and Youngstown Railway Company, The Pittsburgh and Lake Erie Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, and Western Maryland Railway Company, plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, defendants

2 *Docket entries*

Feby. 2, 1933. Bill of complaint filed; same day subpoenas issued returnable February 22, 1933.

Feby. 7, 1933. Subpoenas with affidavit as to service on defendants filed.

Feby. 8, 1933. Motion for preliminary injunction filed; same day order setting motion down for hearing February 27, 1933, at 10 o'clock a.m.; affidavits to be filed by plaintiffs on or before February 14, 1933, by defendants on or before February 23, 1933, and by plaintiffs in reply on or before February 27, 1933; same day order filed. (Exit copies to solicitors.)

Feby. 20, 1933. Order extending time for filing affidavits; same day order filed.

Feby. 21, 1933. Answer of Interstate Commerce Commission filed.

Feby. 23, 1933. Affidavits of J. R. Staley, Robert D. Reeves, O. M. Meyne, S. C. Matthews and J. P. Patterson, on behalf of plaintiffs, filed.

Feby. 27, 1933. Affidavit of George A. Casey on behalf of Interstate Commerce Commission filed.

Feby. 27, 1933. Answer of United States of America filed.

Feby. 27, 1933. Petition of American Barge Line Company filed; same day order granting petitioner leave to intervene as party defendant; same day order filed.

Feby. 27, 1933. Affidavit of Andrew P. Calhoun on behalf of American Barge Line Company, filed.

Feby. 27, 1933. Petition of Inland Waterways Corporation filed; same day order granting petitioner leave to intervene as party defendant; same day order filed.

Feby. 27, 1933. Answer of Inland Waterways Corporation filed.

Feby. 27, 1933. Affidavit of T. Q. Ashburn on behalf of Inland Waterways Corporation filed.

Feby. 27, 1933. Petition of Mississippi Valley Association filed; same day order granting petitioner leave to intervene as party defendant; same day order filed.

Feby. 27, 1933. Petition of Mississippi Valley Barge Line Company filed; same day order granting petitioner leave to intervene as party defendant; same day order filed.

Feby. 27, 1933. Motion of plaintiffs to strike certain paragraphs from intervening petition of Inland Waterways Corporation filed.

3 Feby. 27, 1933. Motion of plaintiffs to amend bill of complaint by striking out The Delaware and Hudson Company as party-plaintiff, filed.

Feby. 27, 1933. Hearing on motion for preliminary injunction.

Mar. 8, 1933. Defendants' requests for findings of fact and conclusions of law filed.

Mar. 11, 1933. Requests of intervenors for findings of fact and conclusions of law filed.

Mar. 16, 1933. Plaintiffs' requests for findings of fact and conclusions of law, filed.
Apr. 14, 1933. Stipulation filed.
June 14, 1933. Opinions of court filed.
June 26, 1933. Final decree that order of Interstate Commerce Commission be set aside and annulled and defendants be perpetually enjoined, &c.; same day decree filed.
August 9, 1933. Petition of denfendants and intervening defendants for appeal, with assignment of errors, filed; same day order allowing appeal; same day order filed.
August 9, 1933. Citation issued.
August 9, 1933. Citation, with acceptance of service by solicitor for plaintiffs-appellees endorsed thereon, filed.
August 9, 1933. Statement as to jurisdiction on appeal filed.
August 9, 1933. Notice of service of copies of appeal papers filed.
August 9, 1933. Praecipe for transcript of record filed.
August 16, 1933. Notice to Attorney General of the State of Delaware of appeal, with acceptance of service endorsed thereon, filed.

4 (File endorsement omitted.)

5 In United States District Court

(Title omitted.)

6 *Bill of complaint.*

Filed February 2, 1933

To the Honorable, the Judges of the District Court of the United States for the District of Delaware:

The Illinois Central Railroad Company, Missouri Pacific Railroad Company, The Chicago, Rock Island and Pacific Railway Company, J. M. Kurn and John G. Lonsdale, receivers of the railroads and properties of St. Louis-San Francisco Railway Company, St. Louis Southwestern Railway Company, The Kansas City Southern Railway Company, Chicago and Eastern Illinois Railway Company, Southern Railway Company, Louisville and Nashville Railroad Company, The New York Central Railroad Company, The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, Lehigh Valley Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, Reading Company, The Central Railroad Company of New Jersey, New York, Ontario and Western Railway Company, The Delaware
7 and Hudson Company, The New York, New Haven and Hartford Railroad Company, Boston and Maine Railroad, The Chesapeake and Ohio Railway Company, Norfolk and Western Railway Company, Grand Trunk Western Railway Company, Wal-

ter S. Franklin and Frank C. Nicodemus, Jr., receivers of the railroads and properties of Wabash Railway Company, Pere Marquette Railway Company, The New York, Chicago and St. Louis Railroad Company, The Ann Arbor Railroad Company, The Akron, Canton & Youngstown Railway Company, The Pittsburgh and Lake Erie Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, and Western Maryland Railway Company, as plaintiffs, complaining of the United States of America and Interstate Commerce Commission, as defendants, respectfully represent:

I

1. The Illinois Central Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Illinois, and operates lines of railroad in the States of Illinois, Iowa, Louisiana, and other States.

Missouri Pacific Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Missouri, and operates lines of railroad in the States of Missouri, Arkansas, Illinois, and other States.

The Chicago, Rock Island and Pacific Railway Company is a corporation organized under and by virtue of the laws of the States of Illinois and Iowa, and operates lines of railroad in the States of Illinois, Iowa, Missouri, Arkansas, Louisiana, Kansas, Oklahoma, and other States.

8 St. Louis Southwestern Railway Company is a railway corporation organized under and by virtue of the laws of the State of Missouri, and operates lines of railroad in the States of Illinois, Arkansas, Louisiana, and Missouri.

The Kansas City Southern Railway Company is a railway corporation organized under and by virtue of the laws of the State of Missouri, and operates lines of railroad in the States of Missouri, Kansas, Arkansas, Oklahoma, and other States.

St. Louis-San Francisco Railway Company is a railway corporation organized under the laws of the State of Missouri, owns lines of railroad in the States of Missouri, Kansas, Arkansas, Oklahoma, and other States, and since November 1, 1932, its railroads and properties have been and are now being operated by J. M. Kurn and John G. Lonsdale, duly appointed as receivers thereof by an order of the District Court of the United States for the Eastern District of Missouri.

Chicago and Eastern Illinois Railway Company is a railway corporation organized under and by virtue of the laws of the State of Illinois, and operates lines of railroad in the States of Illinois and Indiana.

Southern Railway Company is a railway corporation organized under and by virtue of the laws of the State of Virginia, and operates lines of railroad in the States of Illinois, Tennessee, Kentucky, West Virginia, Virginia, and other States.

Louisville and Nashville Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Kentucky, and operates lines of railroad in the States of Illinois, Indiana, Kentucky, Tennessee, and other States.

9 The New York Central Railroad Company is a railway corporation organized under and by virtue of the laws of the States of New York, Ohio, Illinois, Indiana, Pennsylvania, Michigan, and other States, and operates lines of railroad in such States and other States.

The Pennsylvania Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Pennsylvania, and operates lines of railroad in the States of New Jersey, Pennsylvania, Maryland, Ohio, Indiana, Illinois, and other States.

The Baltimore and Ohio Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Maryland, and operates lines of railroad in the States of Maryland, Pennsylvania, Ohio, Indiana, Illinois, and other States.

Lehigh Valley Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Pennsylvania, and operates lines of railroad in the States of Pennsylvania, New York, and other States.

The Delaware, Lackawanna and Western Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Pennsylvania, and operates lines of railroad in the States of New York, Pennsylvania, and other States.

Erie Railroad Company is a railway corporation organized under and by virtue of the laws of the State of New York, and operates lines of railroad in the States of New York, New Jersey, Pennsylvania, and other States.

Reading Company is a railway corporation organized under
10 and by virtue of the laws of the State of Pennsylvania, and operates lines of railroad in the States of Pennsylvania and New Jersey.

The Central Railroad Company of New Jersey is a railway corporation organized under and by virtue of the laws of the State of New York, and operates lines of railroad in the States of Pennsylvania, New York, and New Jersey.

New York, Ontario and Western Railway Company is a railway corporation organized under and by virtue of the laws of the State of New York, and operates lines of railroad in the States of New York, Pennsylvania, and New Jersey.

The Delaware and Hudson Company is a railway corporation organized under and by virtue of the laws of the State of New York, and operates lines of railroad in the States of New York and Pennsylvania.

The New York, New Haven and Hartford Railroad Company is a railway corporation organized under and by virtue of the laws of the States of Connecticut, Massachusetts and Rhode Island, and operates

lines of railroad in the States of Massachusetts, Connecticut, New York, and Rhode Island.

Boston and Maine Railroad is a railway corporation organized under and by virtue of the laws of the State of New York, and operates lines of railroad in the States of Maine, Massachusetts, New Hampshire, Vermont, and New York.

The Chesapeake and Ohio Railway Company is a railway corporation organized under and by virtue of the laws of the States of Virginia and West Virginia, and operates lines of railroad in Virginia, West Virginia, and other States.

11 Norfolk and Western Railway Company is a railway corporation organized under and by virtue of the laws of the State of Virginia, and operates lines of railroad in the States of Virginia, West Virginia, Maryland, and other States.

Grand Trunk Western Railway Company is a railway corporation organized under and by virture of the laws of the States of Michigan and Indiana, and operates lines of railroad in the State of Michigan and elsewhere.

Wabash Railway Company is a railway corporation organized under the laws of the State of Indiana, and owns lines of railroad located in the States of Missouri, Iowa, Illinois, Indiana, and other States, and since December 1, 1931, its railroads and properties have been and are now being operated by Walter S. Franklin and Frank C. Nicodemus, Jr., duly appointed as receivers thereof by an order of the District Court of the United States for the Eastern District of Missouri.

Pere Marquette Railway Company is a railway corporation organized under and by virtue of the laws of the State of Michigan, and operates lines of railroad in that State.

The New York, Chicago and St. Louis Railroad Company is a railway corporation organized under and by virtue of the laws of the States of Ohio, New York, Pennsylvania, Indiana, and Illinois, and operates lines of railroad in those States.

The Ann Arbor Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Michigan, and operates lines of railroad in that State.

12 The Akron, Canton & Youngstown Railway Company is a railway corporation organized under and by virtue of the laws of the State of Ohio, and operates a line of railroad in that State.

The Pittsburgh and Lake Erie Railroad Company is a railway corporation organized under and by virtue of the laws of the States of Pennsylvania and Ohio, and operates lines of railroad in those States.

The Atchison, Topeka and Santa Fe Railway Company is a railway corporation organized under and by virtue of the laws of the

State of Kansas, and operates lines of railroad in the States of Illinois, Iowa, Missouri, Kansas, and other States.

Western Maryland Railway Company is a railway corporation organized under and by virtue of the laws of the States of Maryland and Pennsylvania, and operates lines of railroad in the States of Pennsylvania, West Virginia, and Maryland.

Each of said plaintiffs is a carrier by railroad, subject to the Interstate Commerce Act, is engaged in the transportation of freight and passengers for hire between points on its lines and between points on its lines, on the one hand, and points on the lines of other carriers by railroad on the other, throughout the United States, and was such carrier by railroad and engaged in the transportation of freight and passengers as heretofore described at all times herein mentioned.

2. Defendant, the United States of America, is made a party defendant as directed by the Congress of the United States and as required by section 46 of title 28 of "The Code of the Laws of the United States of America."

13 3. Defendant Interstate Commerce Commission is a public corporation and administrative tribunal created by the act to regulate commerce, approved February 4, 1887, as amended (Interstate Commerce Act), is specifically charged with the administration and enforcement of the provisions of said act and of the Inland Waterways Corporation Act, particularly section 3 (e) thereof (U.S. Code, title 49, sec. 153), and is hereinafter referred to as the Commission.

4. The American Barge Line Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, is engaged in transportation as a common carrier by water, operating barges on the Ohio and Mississippi Rivers between Pittsburgh, in the State of Pennsylvania, and New Orleans, in the State of Louisiana, and receives and delivers freight at intermediate points between the termini just described.

II

The orders of the Commission herein sought to have enjoined, set aside, suspended, and annulled relate to transportation, and were made upon petition of the American Barge Line Company, a corporation, as stated, organized under the laws of the State of Delaware, and a resident of that State, by reason whereof and in accordance with an act of Congress, approved October 22, 1913 (38 Stat. L. 219), known as the District Court Jurisdiction Act, providing for the institution of suits to suspend, annul, enjoin, or set aside, in whole or in part, any order or orders of the In-

14 terstate Commerce Commisison, this court has full and complete jurisdiction to hear and determine this proceeding.

III

1. My application filed March 21, 1931, as amended, the American Barge Line Company, under the provisions of section 3 (e) of the Inland Waterways Corporation Act (U.S.C.A., title 49, sec. 153), as amended May 29, 1928, sought at the hands of the Commission a certificate of public convenience and necessity authorizing operations on the Mississippi and Ohio Rivers between said cities of Pittsburgh and New Orleans, including traffic to and from all intermediate ports, and the establishment on all classes and commodities suitable for river transportation of through barge-rail and rail-barge-rail rates in connection with such river transportation via specified ports of interchange.

2. On March 11, 1932, the Commission, acting upon said application in a certain proceeding known as ex parte no. 102, by order required certain carriers by railroad and their connections, including certain of these plaintiffs, to establish in connection with the American Barge Line Company through barge-rail rates on classes and commodities generally between points described in such orders and report of the Commission and made a part thereof, and also to join with said American Barge Line Company in through rail-barge-rail rates between points described in such report and orders in accordance with certain rules, regulations, and formulae in such report and orders specified.

15 3. Thereafter, on June 14, 1932, the Commission, in said docket, Ex Parte No. 102, application of American Barge Line Company, in response to a petition of that company, filed with the Commission on May 17, 1932, entered its supplemental report and order requiring carriers by railroad and their connections, including certain of these plaintiffs, to establish additional through barge-rail rates and routes on classes and commodities generally over the routes of the American Barge Line Company and connecting carriers by railroad.

4. At the time of the making and entering by the Commission in Ex Parte No. 102 of the reports and orders heretofore referred to, carriers by railroad, including these plaintiffs, maintained through all-rail rates on cotton from points in the Southwest, including points in the State of Arkansas, and including Memphis, Tennessee, on the basis generally prescribed by the Commission in a certain proceeding before that body, known as Rate Structure Investigation, I.C.C. Docket No. 17,000, part 3, Cotton, and reported at 165 I.C.C. 595, and supplemental reports.

These any-quantity rail rates on cotton applied from the points of origin heretofore described to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut were normal rates designed to meet the needs of the traffic, and were not depressed by reason of other and competitive forms of transportation.

Pursuant to the terms of said orders, certain of these plaintiffs and other carriers by railroad joined with said American Barge Line Company in the establishment of barge-rail and rail-barge-rail
16 rates on cotton, in any quantity, from points in Arkansas and from Memphis, Tennessee, to the destination territory above described, by deducting either 20 or 10 percent of the all-rail rates applicable between the ports via which said barge line handled said through shipments, all in accordance with the terms and requirements of the formulae contained in said orders.

5. On August 29, 1932, plaintiffs and other carriers by railroad established carload rates upon cotton from points in Arkansas and from Memphis, Tennessee, to the destination territory above described because of severe competition from unregulated truck and water carriers upon a basis materially lower than the any-quantity rates on cotton theretofore prevailing, and on November 16, 1932, further reduced said carload rates on cotton in the belief that such further reduced rates were necessary to meet the competition above referred to.

6. By petition dated October 31, 1932, the American Barge Line Company requested the Commission to enter an order requiring the carriers by railroad, including certain of these plaintiffs and named in previous orders of the Commission in said Docket Ex parte no. 102, to establish with said American Barge Line Company through rail-barge-rail rates on cotton, in carload lots, from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, and by petition dated November 5, 1932, said American Barge Line Company requested the Commission to enter an order requiring the carriers by railroad, including certain of these plaintiffs,
17 to establish with the American Barge Line Company through barge-rail rates on cotton, in carloads, from Memphis, Tennessee, to all points in the States heretofore mentioned.

7. By petition dated November 12, 1932, and filed with the Commission on November 14, 1932, and by petition dated November 14, 1932, and filed with the Commission on or about November 16, 1932, carriers by railroad operating west of the Mississippi River and carriers by railroad operating lines on railroad east thereof, including plaintiffs in this action, prayed the Commission to set down for hearing the said applications of the American Barge Line Company dated October 31, 1932, and November 5, 1932, and represented to the Commission in their said petitions that without a full and complete hearing, after reasonable notice, at which hearing carriers by railroad, including plaintiffs, shippers, and other parties in interest, and including representatives of the American Barge Line Company, should be permitted to appear and offer testimony and examine and cross-examine witnesses offered by all parties in any respect interested therein, the Commission could not determine—

(a) Whether carriers by railroad, including certain of these plaintiffs, should be required to join with the American Barge Line Com-

pany in establishing through rail-barge-rail rates and through barge-rail rates on cotton, carloads, from Arkansas and Memphis, Tennessee, to the destination territory heretofore described;

(b) Whether such through rail-barge-rail rates and
14 barge-rail rates, or either of them, should be lower or the same as the through all-rail rates then in effect;

(c) What through routes, if any, should be required;

(d) What carriers by railroad, if any, should be required to participate in through rail-barge-rail routes and barge-rail routes;

(e) What rail-barge-rail routes and barge-rail routes, if any, should be established; and

(f) What differential, if any, should be maintained for the water-rail routes under the all-rail routes.

It was urged upon the Commission by said carriers by railroad, including these plaintiffs, in their said petitions for hearing before the Commission, that without testimony and without evidence the Commission could not properly, fairly, or lawfully determine or decide any of the questions presented by the said applications of the American Barge Line Company, or in any way pass upon said applications, having regard to the rights both of said Barge Line Company and carriers by railroad, including plaintiffs herein.

8. The Commission refused to grant to carriers by railroad a hearing in connection with the applications of the American Barge Line Company dated October 31 and November 5, 1932, and heretofore referred to, declined to receive any testimony thereon from any carrier by railroad or other party that might be interested therein, and acting solely upon the unverified petitions of the American Barge Line Company, the Commission, on December 10, 1932, entered its second supplemental report and order in said Ex
15 Parte No. 102 requiring certain carriers by railroad named in its first order entered therein, including certain of these plaintiffs, and their connections, to join with said American Barge Line Company in establishing on or before January 25, 1933, upon notice to the Commission and to the general public by not less than fifteen days filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, joint rates on cotton, in carloads, minimum 37,500 pounds, over barge-rail routes described in its reports and orders heretofore entered in said Docket Ex Parte No. 102, from Memphis, Tennessee, to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, constructed by deducting from the corresponding all-rail rate the differential of 6 cents per 100 pounds, and rail-barge-rail rates from points in Arkansas to the same destinations over rail-barge-rail routes previously prescribed, subject to the minimum weights shown below and constructed by deducting from the corresponding all-rail rates the following differentials:

8 cents—minimum 25,000–40,000 pounds.
6 cents—minimum 35,000–55,000 pounds.
4 cents—minimum 50,000–80,000 pounds.

A copy of said second supplemental report and order, marked "Exhibit A", is hereto attached and made a part hereof the same as if fully incorporated herein.

9. Thereafter the Commission modified its second supplemental order entered as aforesaid by requiring that the rates pre-
20 scribed therein be established on or before February 21, 1933, upon notice to this Commission and to the general public by not less than ten days filing and posting. In all other respects said second supplemental order of the Commission was continued in effect until the further order of the Commission.

10. By petition dated December 30, 1932, and filed with the Commission on January 9, 1933, southwestern carriers by railroad, parties to petition for hearing of date November 12, 1932, requested the Commission to vacate its said supplemental report and order heretofore referred to, reopen the entire proceedings, and prayed that such proceedings be considered and determined by the entire Commission, and by petition dated January 7, 1933, and filed with the Commission on January 9, 1933, said southwestern carriers requested the Commission to extend the effective date of its said second supplemental report entered in Ex Parte No. 102 to April 6, 1933, in order that the Commission might pass on the petition of said southwestern carriers for consideration by the entire Commission of date December 30, 1932. The petitions of said southwestern lines dated December 30, 1932, and January 7, 1933, respectively, were denied January 18, 1933.

IV

1. Plaintiffs aver that each of said plaintiffs now participates in joint through all-rail carload rates on cotton from points of origin in the State of Arkansas, or from Memphis, Tennessee, or from points in Arkansas and Memphis, Tennessee, to destinations in
21 the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, and that if the rail-barge-rail and barge-rail rates prescribed by the Commission in its said second supplemental report and order are made effective each of said plaintiffs will sustain continuing damages and substantial losses in revenue either because the cotton in the transportation of which it now participates will be diverted to rail-barge-rail or barge-rail routes, in which it cannot participate or in which it will be deprived of the full use of its lines of railroad, or because it will be required to participate in the transportation of cotton at rates which are lower than the all-rail rates in which it now participates.

2. Plaintiffs aver that the through rail-barge-rail rates and through barge-rail rates prescribed by the Commission in its said second supplemental report and order, arrived at without a hearing, without investigation, and without any facts wherein to base said rates, are improper, unlawful, unreasonable; are not fairly or rea-

sonably related to all-rail rates on cotton, in carload lots, in effect when said second supplemental report and order were entered and now in effect from and to the same points, and that the minimum differentials prescribed by the Commission in its said second supplemental report and order for application over rail-barge-rail routes from points in Arkansas to the destination territory involved and over barge-rail routes from Memphis, Tennessee, to such destination territory, if made effective, will result in through rail-barge-rail rates and through barge-rail rates from Arkansas and Memphis, Tennessee, respectively, to said destination territory that are unlawful and unreasonably low and will result in unlawfully diverting shipments of cotton from all-rail routes now participated in by these plaintiffs to the rail-barge-rail and barge-rail routes required to be established by the Commission in its said second supplemental report and order entered in Docket Ex Parte No. 102, to the great and continuing damage to these plaintiffs, and each of them, by reason of the fact that plaintiffs, and each of them, will be deprived of revenue that would accrue to them because of the movement in cotton, in carload lots, from Arkansas and Memphis, Tennessee, to the destination territory described in said second supplemental report and order over all-rail routes in which these plaintiffs now participate and in which these plaintiffs did participate at all times herein mentioned.

22

V

1. As hereinbefore alleged, the said second supplemental report and order entered by the Commission in its Docket Ex Parte No. 102 were made and entered upon the unverified petitions of the American Barge Line Company and without affording these plaintiffs, or any of them, an opportunity to be heard and submit testimony and evidence as to any facts in connection therewith.

2. Plaintiffs aver that the Commission was without jurisdiction, power, or authority to make and enter said second supplemental report and order in said Docket Ex Parte No. 102, because at all times prior to the making and entering of said second supplemental order the Commission denied to these plaintiffs, and to each of them, an opportunity to appear before said Commission, or any representative or employee thereof, and offer testimony and place before the Commission facts, circumstances, and conditions so as to enable the Commission before entering said second supplemental order to determine—

23

(a) Whether public interest required or might require the establishment of the rail-barge-rail routes and rates and barge-rail routes and rates ordered to be established;

(b) Whether the rail-barge-rail rates or barge-rail rates ordered to be established, if any, should be lower than the contemporaneously ex-

isting all-rail rates between the origins and destinations covered by said second supplemental order;

(c) The transportation costs via rail-barge-rail routes and barge-rail routes compared to transportation costs via all-rail routes;

(d) The needs of these plaintiffs, and each of them, for revenue as compared with the financial needs of the American Barge Line Company;

(e) Whether the establishment of said rail-barge-rail routes and rates and barge-rail routes and rates requested by the American Barge Line Company would in the operation thereof substantially impair the revenues of these plaintiffs; and

(f) Whether, having regard to the level and measure of the all-rail rates, public interest and the maintenance of an adequate transportation system by railroad required or permitted the establishment of rail-barge-rail and barge-rail routes and rates ordered
24 to be established and maintained by said second supplemental order.

3. Plaintiffs allege that had the Commission, before entering its said second supplemental report and order in said Docket Ex Parte No. 102, afforded these plaintiffs an opportunity to appear and offer testimony of the kind and character described in the paragraph next above, they would have offered before the Commission testimony showing:

(a) That the public interest did not at any time and does not now require the establishment of the rail-barge-rail and barge-rail routes and rates required to be established in said second supplemental order;

(b) That if such rail-barge-rail and barge-rail rates and routes were established, said rail-barge-rail and barge-rail rates should not be lower than the rail rates between the same points;

(c) That the transportation costs via said rail-barge-rail and barge-rail routes are and would be substantially equal to the transportation costs via all-rail routes;

(d) That these plaintiffs, and each of them, were and are in need of revenue in order to maintain an adequate system of transportation by rail, and that to prescribe the rail-barge-rail and barge-rail rates and routes contained in said second supplemental report and order would be to increase the needs of these plaintiffs, and each of them, for revenue;

(e) That the operation of the rail-barge-rail and barge-rail
25 rates and routes petitioned for by the American Barge Line Company in its said petitions of October 31st and November 5th, 1932, differentially under the all-rail routes contemporaneously in effect, would substantially impair the revenues of these plaintiffs, and each of them; and

(f) That, in view of the necessity for an adequate transportation system by railroad, including the railroads of these plaintiffs, the

rail-barge-rail and barge-rail rates and routes required to be established in said second supplemental report and order should not be established.

VI

Plaintiffs further allege that, by reason of the fact that plaintiffs, and each of them, were not afforded a hearing, were not afforded an opportunity to offer testimony of the kind and character before described, before the making and entering by the Commission of its said second supplemental report and order in said Docket Ex Parte No. 102, said second supplemental report and order and every part thereof is unlawful and void and beyond the power and authority of the Commission to make, and if enforced against these plaintiffs, or any of them, takes the property of these plaintiffs, and each of them, without due process of law, in violation of the provisions of amendment V to the Constitution of the United States.

VII

1. Plaintiffs also aver that the action of the Commission in
26 not affording to plaintiffs, and to each of them, an opportunity to be heard and offer testimony before making and entering said second supplemental report and order in Docket Ex Parte No. 102, is based upon the fact that the Commission has construed the provisions of section 3 (e) of the Inland Waterways Corporation Act (U.S.C.A., title 49, sec. 153), as amended May 29, 1928, as neither authorizing nor requiring a hearing by the Commission before entering orders of the kind and character of said second supplemental report and order, and acting upon such construction of such statute, the Commission at all times denied these plaintiffs a hearing of any kind before entering said second supplemental report and order.

2. Plaintiffs show that the questions as to what rail and water rates, upon what commodities applicable, limitations as to routes, and the relationship which rail-water and rail-water-rail rates should properly bear to all-rail rates between the same points are of infinite complexity and cannot be properly and fairly determined by the Commission without the benefit of a full and fair hearing and the presentation of competent and lawful evidence by all parties interested therein.

VIII

Plaintiffs aver that said section 3 (e) of the Inland Waterways Corporation Act, as amended, neither requires nor authorizes the issuance by the Commission of orders establishing joint through rail-water and rail-water-rail routes and rates without prior hear-
27 ing upon the issues involved, and that in issuing said second supplemental report and order without according to plain-

tiffs and to other carriers by railroad a full and fair hearing, the Commission misinterpreted and misconstrued said section 3 (e) of the Inland Waterways Corporation Act, as amended, and proceeded upon a misconception thereof and of its powers and duties thereunder, by reason whereof the order of the Commission is void and is in excess of the duties and powers created and imposed by said section 3 (e) of the Inland Waterways Corporation Act, as amended.

IX

Plaintiffs further aver that if the Commission has correctly construed or applied the provisions of section 3(e) of the Inland Waterways Corporation Act (U.S.C.A., title 49, sec. 153), as amended May 29, 1928, and that if such provisions either authorize or require the Commission to enter its said second supplemental report and order in said Docket Ex Parte No. 102, without affording these plaintiffs, and each of them, a reasonable opportunity to be heard and offer testimony in opposition to the granting of the petitions of the American Barge Line Company, dated, respectively, October 31 and November 5, 1932, before the Commission made or entered any report or order in connection therewith, then the provisions of said section 3(e) of the Inland Waterways Corporation Act (U.S.C.A., title 49, sec. 153), as amended May 29, 1928, are void, contravene the provisions of amendment V to the Constitution of the
28 United States and take the property of these plaintiffs, and each of them, without due process of law, in violation of said amendment V to the Constitution of the United States.

X

Plaintiffs further aver that if the interpretation placed by the Commission upon said section 3(e) of the Inland Waterways Corporation Act, as amended, is correct, then the provisions of said section 3(e) are unconstitutional and void because in contravention of the provisions of article I of the Constitution of the United States, because said section 3(e), so construed as permitting the Commission to establish through rail-water and rail-water-rail routes and rates differentially related to all-rail routes and rates between the same points without the benefit of hearing as to the issues involved, constitutes an unlawful delegation by Congress of its legislative power and authority, contrary to article I of the Constitution of the United States.

XI

The said second supplemental order requires the carriers by railroad, parties thereto, including certain of these plaintiffs, to put into effect the rail-barge-rail and barge-rail rates and routes prescribed in said second supplemental order on or before February 21, 1933, upon not less than ten days' filing and posting in the

manner prescribed in section 6 of the Interstate Commerce
29 Act. And, unless the enforcement, operation, and execution of said second supplemental order is restrained and suspended during the pendency of this proceeding, irreparable injury will ensue to plaintiffs in that they will be compelled under the severe penalties prescribed by the Interstate Commerce Act to establish and participate in the rail-barge-rail and barge-rail rates fixed by said order at a heavy and substantial loss in revenues, because said rates are substantially lower and will yield substantially less revenue than the all-rail rates now in effect and in which plaintiffs participate; or will, as hereinbefore particularly alleged, sustain substantial losses in revenue because of the diversion of traffic from all-rail routes in which such plaintiffs now participate to rail-barge-rail and barge-rail routes in which said plaintiffs cannot participate, or will be deprived of the full use of their lines of railroad.

No part of the damages that will be sustained by plaintiffs, and each of them, if the said second supplemental order is made effective, can be restored to said plaintiffs, but will remain a permanent loss to plaintiffs.

XII

Wherefore, plaintiffs pray:

(a) That a subpoena or subpoenas in chancery issue out of and under the seal of this honorable court directed to the defendants, as required by law, and that due and proper service of such process and of this bill of complaint be forthwith made by filing a
30 copy thereof in the office of the Secretary of the Commission, and another copy in the Department of Justice, as in said District Court Jurisdiction Act provided, and that thereby the defendants, and each of them, be required, on or before a date to be specified in such subpoena or notice, to appear herein and answer this bill of complaint, but not under oath, answer under oath being hereby expressly waived.

(b) That a temporary or interlocutory injunction be entered herein, restraining, enjoining, and suspending, until the further order of this court, the effect and enforcement of said order of the Commission.

(c) That pending a hearing upon the aforesaid application for a temporary or interlocutory injunction a preliminary restraining order be issued in terms restraining, enjoining, and suspending the enforcement of said order of the Commission until said application for a temporary or interlocutory injunction shall have been heard and determined.

(d) That after final hearing this court adjudge, order, and decree that said order of the Commission is and has at all times been beyond the lawful authority of the Commission, and wholly void, and that said order be perpetually set aside, suspended, and annulled, and the enforcement perpetually enjoined.

(e) That complainants, and each of them, may have such other and further relief in the premises as to equity and justice may
31 appertain and as may be deemed by this honorable court to be adequate and proper under the circumstances.

ELMER A. SMITH,
A. B. ENOCH,
M. G. ROBERTS,
W. A. COLE,
BRONSON JEWELL,
M. CARTER HALL,
JOHN F. CONNERS,
A. H. KIRKADDEN,
JAMES STILLWELL,
D. B. CONNELL,
E. ENNALLS BERL,
HERBERT S. HARR,
M. B. PIERCE,
W. A. NORTHCUTT,
W. N. MCGEHEE,
H. H. LARIMORE,
R. S. OUTLAW,

Solicitors for Plaintiffs,
2008 Missouri Pacific Bldg., St. Louis, Mo.

32 [*Duly sworn to by J. R. Staley, jurat omitted in printing.*]

33 *Exhibit A to bill of complaint*

Interstate Commerce Commission

Ex Parte No. 102

Application of American Barge Line Company

Decided December 10, 1932

Barge-rail and rail-barge-rail rates on cotton, in carloads, from certain points in Arkansas and Memphis, Tenn., to eastern territory and New England prescribed. Prior reports, 182 I.C.C. 521 and 185 I.C.C. 483

SECOND SUPPLEMENTAL REPORT OF THE COMMISSION

Division 4, Commissioners Meyer, Eastman, and Mahaffie

By Division 4:

In the original report in this proceeding, 182 I.C.C. 521, we granted applicant a certificate of public convenience under the provisions of section 3 (e) of the Inland Waterways Corporation Act, as amended by the so-called Denison Act, covering its operations on the Ohio and Mississippi Rivers, and required the establishment of through routes and joint rates, on both class and commodity traffic, between points in trunk-line territory and southern New England, on the one hand, and Memphis, Tenn., and points in Arkansas,
34 on the other hand. Certain additional routes and rates were required by a supplemental report, 185 I.C.C. 483. The prior reports were adopted March 11 and June 14, 1932, respectively, and

the findings provided for joint barge-rail and rail-barge-rail rates differentially related to the corresponding all-rail routes contemporaneously applicable and made by use of the so-called Ex Parte No. 96 formula originally adopted for use in connection with the Federal barge lines. Rates and differentials will be stated in amounts per 100 pounds.

At the time of the adoption of the orders above referred to the all-rail rates on cotton from points in the Southwest were any-quantity rates on the basis prescribed in Rate Structure Investigation, part 3, Cotton, 165 I.C.C. 595. The rate on compressed cotton from Little Rock, Ark., to Boston, Mass., for example, was $10. About September 1, 1932, the southwestern railroads published carload rates on cotton to various points, including those in trunk-line territory and New England, considerably lower than the any-quantity rates.

These new carload rates were established because of competition from unregulated truck and water carriers and bear an expiration date of July 31, 1933. In November 1932 the new carload rates were further reduced on the ground that they originally had not been made low enough to accomplish the desired purpose.

Because the carload rates are regarded as depressed rates compelled by strong competition, the rail lines connecting with the applicant have declined to join with it in rail-barge-rail and barge-rail rates differentially related to the carload all-rail rates. The applicant has, therefore, filed petitions with us, seeking supplemental orders requiring the establishment of rail-barge-rail rates from all points in Arkansas and barge-rail rates from Memphis to all points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, applicable via the applicant's line between Memphis and Pittsburgh, Pa., and based on differentials under the carload rail rates.

The present all-rail rates from Little Rock and grouped points to all of trunk-line territory and New England are as follows: 69 cents, minimum 50,000–80,000 pounds (depending on length of car); 75 cents, minimum 35,000–55,000 pounds; 84 cents, minimum 25,000–40,000 pounds. These rates apply on cotton in bales, compressed or uncompressed. The rate from Memphis to the same destinations is 69 cents, minimum 37,500 pounds. The applicant suggests that the rail-barge-rail rates from Arkansas be based on differentials of 9, 10, and 11 cents, respectively, under the all-rail rates. It proposes a differential of 10 cents for the barge-rail rate from Memphis. Applicant urges that these proposed differentials are consistent with the Ex Parte No. 96 formula, since they approximate 20 percent of a theoretical all-rail rate from Memphis to Pittsburgh arrived at by reducing the present Memphis-Pittsburgh any-quantity rate proportionately to the difference between the carload any any-quantity rates to the East.

The southwestern rail carriers contend that they should not be required to join in the rates proposed by the applicant, because

the all-rail carload rates are experimental and published only
36 in an endeavor to retrieve traffic lost to unregulated forms of transportation, including the applicant's barge line, and are below maximum reasonable rates. They point out that applicant seeks rates from all points in Arkansas, whereas under the circuity limitations imposed in our original report, routes were established from only a limited number of Arkansas points to the destination territory here involved. It is further contended that establishment of the rates sought by applicant would be a source of disadvantage to many producers and consumers of cotton in the South and Southwest. Comments of the so-called east-side rail lines, with which the applicant competes between Memphis and Louisville, Kentucky, are somewhat similar. These lines denounce the applicant for engaging in what is alleged to be destructive competition with them by "demoralizing the rate situation on the Ohio and Mississippi rivers on coffee, sugar, cotton, and other commodities" through its unregulated port-to-port rates. They further assert that applicant's water route from Memphis to Pittsburgh is not practicable for the transportation of cotton and no more economical than the all-rail routes. The eastern trunk lines with which applicant connects at Pittsburgh likewise oppose its petitions. All the rail carriers urge that these petitions should not be acted on except after hearing.

Replies in opposition to the petitions have been filed on behalf of warehouse and compress concerns at Memphis and certain southwestern points, which consider a hearing as to proposed differential rates necessary to protect their interests, and on behalf of the American Cotton Manufacturers' Association and other organiza-
37 tions representing southern textile manufacturers, who fear that any further reduction in rates available to eastern manufacturers would adversely affect the southern mills. Letters and telegrams protesting against the establishment of the rates sought by the applicant and requesting that the petitions be set for hearing have been received from the principal commercial traffic organizations of Memphis and New Orleans, and a cotton cooperative association at Greenwood, Miss.

In response to the considerable number of requests that these petitions be assigned for hearing, it should be pointed out that in Procedure Under Barge Line Act, 148 I.C.C. 129, after instituting a proceeding to ascertain the views of interested parties with respect to the meaning and purpose of the Denison Act before undertaking its administration, we came to the conclusion that that act does not authorize hearings as to the differential rates referred to herein, being "an attempt to substitute for hearings prior to our orders establishing through routes and joint rates, fixing differentials, and prescribing equitable divisions, subsequent hearings upon complaint." The reasons for that conclusion were very fully stated in that report, are quite as applicable here, and need not be repeated. No petitions for reconsideration were thereafter filed. We further pointed out

that the act made provision for possible changes in level in the following sentence contained therein:

"Such joint routes, rates, rules, regulations, and practices may be changed by order of the Commission or by agreement of the water carriers and the other participating carriers."

There is no provision for hearings in connection with such modifying orders, and to hold prior hearings would be inconsistent with the plain intent of the act. In the past we have entered such orders without hearing on several occasions when the need therefor was brought to our intention. In the prior orders in this proceeding we prescribe rates on cotton applicable on shipments in any quantity corresponding to the application of the rail rates. We are now called on to change those rates in so far as they apply on carload shipments of certain minimum weights in the light of changes which have been made in the rail rates. The facts upon which we rely in this report are verified by the tariffs in our files and by information obtained in connection with other proceedings.

The question of our power to prescribe joint rates between rail lines and a water carrier differentially lower than corresponding all-rail rates which are admittedly lower than maximum reasonable rates arose in Inland Waterways Corp. *v.* C. G. W. R. R. Co., 129 I.C.C. 521. We there stated it to be our opinion that—

"we are warranted in prescribing rates which are relatively reasonable measured by the rates in effect over existing through routes between the same points. Furthermore, in prescribing such reasonable rates over a barge-rail route they may properly be made somewhat lower than the rates in effect over the competitive all-rail routes, provided the shrink is borne by the barge line . . ."

This conclusion was supported by the subsequent passage of the Denison Act, concerning which we said in Procedure Under Barge Line Act, supra:

39 "The immediately following direction that we shall 'fix reasonable minimum differentials between all-rail rates and joint rates in connection with said water service' also makes it clear that the latter shall be fixed in terms of a relationship with the corresponding all-rail rates, i.e., that we shall fix a minimum spread which shall persist even if changes are made in the level of the rates."

The all-rail carload rates with which a differential relationship is here sought by the applicant are new rates supplementing the rates in effect on the date of our prior orders in this proceeding. The former findings as to a proper differential under those rates are not controlling here, and it becomes necessary to consider the question in the right of present conditions. It should be noted that applicant is not proposing differentials as great as those which would result from applying the formula followed in our former findings, presumably recognizing the depressed nature of the base all-rail rates.

The question of the amount of the differentials to be prescribed is difficult, and the petitions and replies throw little light upon it. Under the law the differentials must be such that the joint rail-water

transportation to which they relate shall be upon terms reasonably fair to both rail and water carriers, not designed to divert traffic from one or the other, but to reflect differences in cost and value of service. At the time of the establishment of the all-rail carload rates from the Southwest to eastern points, rates of a similar nature were established from Arkansas to New Orleans. By agreement between the Federal barge lines and the southwestern rail carriers
40 barge-rail rates via Memphis were established, reflecting the following differentials: Minimum 25,000–40,000 pounds (depending on length of car), 5 cents; minimum 35,000–55,000 pounds; minimum 50,000–80,000 pounds, 2 cents. There are differences between the character of the service performed by the applicant and that of the Federal lines, some of which applicant points out. The all-rail rates to eastern territory are also higher than those to New Orleans. Therefore we think the differentials may be somewhat greater than those governing the rates via the Federal lines to New Orleans, but less than those which the applicant requests.

Upon further consideration of the matters involved in this proceeding we find that the rates heretofore prescribed on cotton, insofar as they apply on shipments in carloads, should be changed; that rates on cotton, in carloads, from points in Arkansas to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut should be established for application only over rail-barge-rail routes heretofore prescribed in this proceeding from and to such points, based on the following differentials under the corresponding all-rail rates, which we find to be reasonable minimum differentials: 8 cents, minimum 25,000–40,000 pounds; 6 cents, minimum 35,000–55,000 pounds; 4 cents, minimum 50,000–80,000 pounds. We further find that a barge-rail rate on cotton, in carloads, minimum 37,500 pounds, from Memphis to the destinations above referred to should be established for application only over barge-rail routes heretofore prescribed in this proceeding from and to such points based on a differential of 6 cents, which we find to be a reasonable minimum differential.

41 Mahaffie, Commissioner, dissenting:

No hearing has been held on these applications. No record is before us. The majority action is based on the applicant's two unverified petitions. The all-rail rates here considered are about 50 percent of what we have held to be reasonable maximum rates. Notwithstanding this, the majority prescribe minimum differentials thereunder for the water-rail routes required. In my judgment, section 3(e) of the Inland Waterways Corporation Act, read with section 15(3) of the Interstate Commerce Act and considered in the light of the purpose of the Congress as stated in section 500 of the Transportation Act, does not require us to decide a case such as this without the benefit of a record. Section 3(e) provides that on the issuance of a certificate of public convenience and necessity we "shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through

routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended, and the Commission shall, in such order, fix reasonable minimum differentials between all-rail rates and joint rates in connection with said water service to apply until changed by order of the Commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the Commission or by agreement of the water carriers and the other participating carriers." We complied fully with this direction at the time the certificate issued. I do not understand the provision to require that orders be issued without hearing or record on subsequent applications not involving a certificate.

We need a record here in order to decide intelligently. The
42 persons who claim they will be greatly hurt if the petitions are granted ought to have a chance to put the facts before us. I would set the applications, when properly verified as required by our rules of practice, for hearing.

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D.C., on the 10th day of December, A.D. 1932

Ex Parte No. 102

Application of American Barge Line Company

Upon further consideration of the matters and things involved in the above-entitled proceeding

It is ordered, That the second ordering paragraph of the order of March 11, 1932, in said proceeding be, and it is hereby, amended to read as follows:

"It is further ordered, That, except as provided in the next succeeding paragraph hereof, said common carriers by rail, parties to the through routes prescribed in the next preceding paragraph hereof, be, and they are hereby, directed and required to join with said American Barge Line Company in establishing, on or before September 19, 1932, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, joint rates applicable over said through routes, constructed by deducting from the lowest all-rail rate contemporaneously applicable on corresponding traffic over any route between the same points of origin and destination the following differentials: (a) Where over barge-rail routes the shortest all-rail distance via the lines of the con-
43 necting rail carriers from point of origin to point of destination through the port of interchange does not exceed the

shortest rail distance between such points of origin and destination by more than 20 percent, where over barge-rail routes the shortest all-rail distance between the inland point of origin or destination and the port of interchange does not exceed two thirds of the shortest all-rail distance, where over rail-barge-rail routes the shortest all-rail distance from point of origin to point of destination through the port of interchange does not exceed by more than 20 percent the shortest rail distance between such points of origin and destination, and where over rail-barge-rail routes the total rail haul is not more than one half of the shortest all-rail distance between points of origin and destination, 20 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by said American Barge Line Company; and (b) in all other cases, 10 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by said American Barge Line Company; Provided, however, that no such joint commodity rate need be established where the corresponding all-rail rate over the direct route from or to an interior point to or from a port of destination or origin involves at intermediate points departures from the long-and-short-haul provision of the fourth section of the Interstate Commerce Act, nor if said American Barge Line Company and the interested rail carriers agree that no such joint commodity rate shall be established; and Provided, further, that no joint barge-rail or rail-barge-rail rate established under this order from or to any given point of origin or destination need be lower than the corresponding all-rail rate between such point of origin or destination and the port of interchange."

44 It is further ordered, That said order be, and it is hereby, further amended by inserting the following paragraph between the second and third ordering paragraphs thereof:

"It is further ordered, That said common carriers by rail, parties to the through routes hereinbefore prescribed, be, and they are hereby, directed and required to join with said American Barge Line Company in establishing on or before January 25, 1933, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, joint rates on cotton in carloads, minimum 37,500 pounds, over barge-rail routes hereinbefore prescribed from Memphis, Tenn., to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, constructed by deducting from the corresponding all-rail rate the differential of 6 cents per 100 pounds, and rail-barge-rail rates from points Arkansas to the same destinations over rail-barge-rail routes hereinbefore prescribed, subject to the minimum weights shown below and constructed by deducting from the corresponding all-rail rates the following differentials: 8 cents, minimum 25,000–40,000 pounds; 6 cents, minimum 35,000–55,000 pounds; 4 cents, minimum 50,000–80,000 pounds."

And it is further ordered, That in all other respects said order, as amended, shall continue in effect until the further order of the Commission.

By the Commission, division 4.

[SEAL.]

GEORGE B. MCGINTY,
Secretary.

45 In United States District Court

[Title omitted.]

Answer of United States of America.

Filed Feb. 27, 1933

United States of America, one of the defendants in the above-entitled cause, for answer to the bill of complaint filed therein against it answers and says:

I

United States admits for the purposes of this suit that the facts alleged in the opening paragraph and paragraphs I and II of the bill are true, with this exception: It says that while the Interstate Commerce Commission is charged with the administration and enforcement of so much of the Inland Waterways Corporation Act as is involved in this suit, said Commission is not charged with enforcement of all the provisions of said act, as concluded in subparagraph (3) of said paragraph I.

II

46 United States admits the truth of the allegations contained in paragraph III of the bill, except the allegations contained in the second subdivision of subparagraph (4), which allegations United States says are irrelevant, incompetent, and immaterial to any issue which may be properly raised in this suit; and except the statement in subparagraph (9) that the rates prescribed by said Commission were required to be established on or before February 21, 1933, with respect to which allegation United States alleges that said Commission has now extended the effective date of its said order to April 22, 1933.

III

United States denies the allegations contained in paragraph IV of the bill, except that it admits the allegation made in part in the first sentence thereof that plaintiffs now participate in joint through all-rail carload rates on cotton from points of origin in Arkansas and Tennessee to destinations in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

Further answering subparagraph (2) of said paragraph IV, United States denies that this court has jurisdiction to determine

the question whether the rail-barge-rail rates and the barge-rail-rates therein mentioned are "fairly or reasonably related to all-rail rates on cotton", and says that the question thereby raised is purely administrative and not judicial.

IV

Answering paragraph V of the bill, United States admits that the allegations of subparagraph (1) thereof are true.

Answering subparagraph (2) thereof, United States denies that the Commission was without jurisdiction, power, or authority
47 to make and enter its said second supplemental report and order; admits that the Commission refused to grant a hearing to plaintiffs prior to the making and entering of said report and order; but alleges that said Inland Waterways Corporation Act, under which the Commission acted in making said report and order, required the Commission to act promptly in the establishment of joint through rates and without having granted a hearing to plaintiffs or other parties prior to the issuance of its order establishing such rates.

For answer to subparagraph (3) of said paragraph V, United States says that it is without knowledge as to what testimony plaintiffs would have offered had they been granted the hearing sought by them prior to the issuance of the Commission's said order, and as to the allegations of said subparagraph (3), it neither admits nor denies.

V

United States denies the allegations contained in paragraph VI of the bill.

VI

Answering paragraph VII of the bill, United States admits the allegations of subparagraph (1) thereof, and denies the allegations of subparagraph (2) of said paragraph VII.

VII

United States denies each and every allegation made and contained in paragraphs VIII, IX, X, and XI of the bill, and particularly denies the allegation in said paragraph XI that enforcement
48 of the Commission's said order will result in irreparable injury or any other legal damage to plaintiffs. Further answering said paragraph XI, United States alleges that the Commission has now extended to April 22, 1933, the time within which the rates and routes prescribed by its said order must be established.

VIII

Further and affirmatively answering the bill of complaint, United States alleges that the Commission was fully authorized and em-

power by said act to make and enter its said order; that in making and entering said order the Commission did not act unreasonably, arbitrarily, or otherwise in excess of or contrary to the powers reposed in it by said act; that the Commission properly construed said act to require that it proceed by order to prescribe and establish through routes and joint through rates without having accorded the plaintiffs or other interested parties an opportunity to be heard prior to the issuance of said order; that although said act requires the Commission to establish through routes and joint rates, by order, without prior hearing, said act expressly authorizes the Commission, upon complaint, at once, and without answer or other form of pleading by interested carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of the through routes or joint rates filed pursuant to such order, or (2) the reasonableness of any minimum differentials between all-rail rates and joint rates in connection with any water service, or (3) the reasonableness of any division of the joint rates so ordered by the Commission, and that after
49 full hearings the Commission may make such order with reference to any such matters as it may find to be proper and in the public interest; that plaintiffs' petition to the Commission for prior hearing was denied by the Commission subject to the express proviso "that the action herein is without prejudice to respondents' right to a summary hearing concerning the reasonableness of the through routes, joint rates, and minimum differentials prescribed in the order of March 11, 1932, in said proceeding, as amended by said order of December 10, 1932, upon complaint filed as authorized by the Inland Waterways Corporation Act"; that plaintiffs have neglected and failed to file such complaint, and have not requested the Commission for a hearing, as provided by said act, concerning the reasonableness of the through routes, joint rates, and minimum differentials prescribed by said order.

IX

Except as herein expressly admitted, United States denies each and every allegation made and contained in the bill of complaint and in the several separate paragraphs and subdivisions thereof.

X

For a further and separate defense United States avers that this suit is prematurely brought, and that plaintiffs are not entitled to maintain it for the reason that they have not filed a complaint or requested a hearing by the Commission, as provided by said act, concerning the reasonableness of the through routes,
50 joint rates, and minimum differentials prescribed by said order, and have, therefore, failed and neglected to avail themselves of, and to exhaust the administrative remedies expressly

provided by, said act; and that until they have conformed to the procedure expressly provided by said act, and have exhausted the remedies before the Commission expressly provided by said act, plaintiffs are without right to maintain this suit.

Wherefore, having fully answered the bill of complaint, United States prays that the relief therein prayed be denied and the bill of complaint dismissed with costs to the plaintiffs, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

(Sgd.) ELMER B. COLLINS,
Special Assistant to the Attorney General.

(Sgd.) LEONARD E. WALES,
United States Attorney.

51 [*Duly sworn to by Elmer B. Collins, jurat omitted in printing.*]

[File endorsement omitted.]

52 In United States District Court

[Title omitted.]

Answer of Interstate Commerce Commission

Filed February 21, 1933

The Interstate Commerce Commission, one of the defendants herein, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exceptions to the many errors and insufficiencies in the plaintiffs' bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs numbered I and II of said bill of complaint, the Commission admits that the allegations therein contained are true except that in respect of the allegation in subpara-
53 graph numbered 3 of paragraph I, it avers that it is charged with the enforcement of certain but not of all the provisions of the Inland Waterways Corporation Act.

II

Answering paragraph III of said bill, the Commission admits the filing with it of the applications by the American Barge Line Company and the making and issuing by the Commission of the reports and orders as alleged in subparagraphs numbered 1, 2, and 3,

except that it avers that the application referred to in subparagraph 1 was filed with the Commission, March 20, 1931, and not March 21, 1931, as alleged. The Commission avers that in its said reports and orders it set forth its finding, conclusions, and requirements and the Commission respectfully refers the court to said reports and orders, a copy of each of which is attached to and made a part of this answer as exhibits A and B, for full and precise information as to its statements, findings, and conclusions in the premises.

The Commission admits the allegations contained in subparagraphs numbered 4, 5, and 6 of said paragraph III, except that it is uncertain as to the meaning of the allegation in subparagraph 4 that the any-quantity rail rates on cotton were normal rates, and therefore neither admits nor denies that allegation; if, however, such allegation is to be taken and understood to aver that such rates so applied were reasonable rates, it admits the same.

Answering subparagraph numbered 7, the Commission admits that certain papers or documents were filed with it on the dates specified by plaintiffs and other rail carriers, but avers that each of said papers or documents was designated as a reply to the petitions
54 of the American Barge Line Company and request for hearing upon said petitions; that with respect to the allegations as to the representations and request made therein, it submits that the said papers or documents are the best evidence thereof; and that the allegations with respect to the contents thereof are conclusions to which it is not required to make answer; it further avers that said allegations are not completely accurate.

In answer to the allegation contained in subparagraph numbered 8, the Commission admits the allegation thereof, but concerning its refusal to grant a hearing on the applications specified therein, of the American Barge Line Company, the Commission avers that as is shown in its report, copy of which is made exhibit A to the bill of complaint, in so declining to allow a hearing and the introduction of evidence it proceeded in strict accordance with the provisions of the applicable statute, namely, section 3 (e) of the Inland Waterways Corporation Act, as amended by the so-called Denison Act, U.S. Code, tit. 49, c. 5, sec. 153 (e); that said section does not provide for a hearing upon an application such as those presented by the American Barge Line Company, prior to consideration or the allowance thereof by the Commission; that the action of the Commission in denying a hearing was consistent with the established and consistently maintained practice of the Commission in such cases based upon its ruling and report, dated November 12, 1928, Ex Parte 94, in a proceeding styled Procedure under Barge Line Act, reported in 148 I.C.C. 129; that the said practice of the Commission was not only required by the plain terms of the statute but was consistent with the intent, plan, and purpose of the Congress of the United States in the enactment of said section.

55 With respect to the allegation that the Commission acted upon the unverified petitions of the American Barge Line

Company, the Commission avers that neither the statute nor the particular applicable rule of practice of the Commission, rule XVIII-A, requires or provides that such application be verified. Further answering, it alleges that there was neither a challenge of the statements of fact made in said applications nor a charge that the facts therein set forth were untrue, made by plaintiffs herein.

Answering subparagraph numbered 9, the Commission admits that the allegations therein contained are true, but avers that subsequent to the time specified therein and on February 2, 1933, it entered an order further postponing until April 22, 1933, the effective date of its order of December 10, 1932.

Answering subparagraph numbered 10, the Commission admits the allegations therein contained, but in this connection avers and shows to the court that its order of January 18, 1933, denying the petitions of the so-called "southwestern" carriers, contained a proviso that the action was without prejudice to the petitioners' right to a summary hearing concerning the reasonableness of the through routes, joint rates, and minimum differentials prescribed by its previous orders, upon complaint filed as authorized by the Inland Waterways Corporation Act. A copy of said order is herewith attached marked exhibit C and made a part of this answer.

III

Answering paragraph IV of the said bill of complaint, the Commission denies the allegations therein contained, except the
56 allegation contained in subparagraph numbered 1 thereof that plaintiffs now participate in joint through all-rail carload rates on cotton from origin to destination points as stated, which allegation it admits.

IV

Answering paragraph V of the bill of complaint, the Commission submits that subparagraph 1 thereof is a repetition of allegations contained in subparagraph numbered 8 of paragraph III of said bill, and therefore the Commission refers to and incorporates by reference here as answer to this subparagraph, the averments set forth in paragraph II of this answer with respect to said subparagraph numbered 8.

The Commission denies the allegations of subparagraph numbered 2 of said paragraph V that it was without authority, power, or jurisdiction to enter its second supplemental order for the reasons set forth in said subparagraph or for any other reason or reasons. On the contrary, it submits and alleges that prior to the making and issuing of its second supplemental report and order, dated December 10, 1932, it carefully weighed each fact set forth in the said petitions in the light of its own knowledge and experience; and as shown in its report gave consideration to contentions advanced by the plaintiffs herein in their "reply" to the applications

of the American Barge Line Company, as well as to protests and communications of others; that said order was not entered without facts to support it; that in the making of said order the Commission did not exceed the authority which had been duly, validly, and lawfully conferred upon it; and that in making said order the Commission proceeded in strict and full conformity to the plain
57 and express terms of the applicable law. The Commission further alleges that under said law the plaintiffs herein were not entitled to a hearing upon the matters and things covered by the said petitions, prior to the allowance thereof, nor until the through routes and joint rates prescribed therein had been filed in compliance with said order.

The Commission further alleges that the plaintiffs herein did not proceed either in accordance with, or as required by, the statute, in that they did not file and have not filed a complaint attacking either the lawfulness or reasonableness of the through routes or rates, or any of them, or of the reasonableness of any minimum differentials between all-rail rates and joint rates in connection with any water service or the reasonableness of any division of joint rates, whereas the statute requires the filing of a complaint as a prerequisite to a hearing, and provides for a hearing only on the particular matters as specified therein.

For answer to subparagraph numbered 3 of said paragraph, the Commission submits that the allegations therein present merely a conclusion of law, and in addition are speculative and an answer thereto is not required; that the Commission is without knowledge or information as to what would have been proved had a hearing been had as requested by plaintiffs; therefore it denies the allegations, and it also denies that all the matters set forth in said subparagraph would be material in such a hearing.

V.

Answering paragraph VII of the bill of complaint, the Commission admits the allegations contained in subparagraph 1 thereof and denies the allegations contained in subparagraph 2 thereof.

58

VI

Answering paragraphs VI, and VIII to X, inclusive, of the bill of complaint, the Commission denies each and every allegation therein contained and avers that its said second supplemental report and order were and are valid; that said report and order were made pursuant to and in due and strict conformity to the power and authority validly conferred upon it by the Congress; that in making and issuing the said report and order, it did not exceed the power and authority so conferred; and that said report and order were not made improvidently or arbitrarily or without facts to support them. It further alleges that in the application of the statute under the

authority of which the Commission entered its said report and order, the Commission followed and observed the mandate and provisions of said statute and proceeded in full accordance therewith. That in so acting and proceeding there was no misconstruction or misinterpretation or misapplication of the statute.

The Commission particularly denies that the enforcement of its second supplemental report and order takes or will take the property of plaintiffs or any of them without due process of law in violation of any of the provisions of the Constitution of the United States, as in paragraph VI alleged, and it further denies that the section 3 (e) of the Inland Waterways Corporation Act, as amended, in itself or as interpreted or applied by the Commission, is void as contravening said Constitution for the reasons stated in paragraphs IX and X, or otherwise. On the contrary, it avers that in and by said section 3 (e) the constitutional rights of plaintiffs and all others coming within its terms, are safeguarded and secured by virtue
59 of particular provisions thereof which confer authority upon the Commission to enter upon a hearing if and when complaint as specified therein is made to it in the manner prescribed: that plaintiffs have refused and neglected to follow the procedure prescribed in, and contemplated by, the said section.

VII

Answering paragraph XI of said bill of complaint, the Commission admits that its second supplemental order requires compliance therewith as specified except as to the effective date thereof and in that regard it avers that the effective date of said order has now been extended to April 22, 1933. The Commission denies each of and all the other allegations in said paragraph contained.

For a further and separate defense the Commission avers that the said plaintiffs are not entitled to maintain this suit in that they have failed to exhaust their remedy before the Commission, for that, by the applicable law, provision is made for a hearing upon the filing of a complaint when the joint-rate schedules are filed as required by the Commission's order; that upon so filing the plaintiffs may obtain the benefit of such provision and be accorded a hearing; that until they have conformed to the statute, they have no standing to maintain this suit.

All of which matters the Commission is ready to aver, maintain, and prove as this honorable court may direct. Wherefore,
60 having made full and complete answer, the Commission prays that the bill of complaint be dismissed at plaintiffs' cost.

INTERSTATE COMMERCE COMMISSION,
By (Sgd.) H. L. UNDERWOOD, *Attorney.*
(Sgd.) DANIEL W. KNOWLTON,
Chief Counsel. Of Counsel.

[*Duly sworn to by Joseph B. Eastman, jurat omitted in printing.*]

61 *Exhibit "A" to answer of I.C.C.*

17608

Interstate Commerce Commission

Ex Parte No. 102

Application of American Barge Line Company

Submitted December 30, 1931. Decided March 11, 1932

1. Certificate of public convenience and necessity granted to the American Barge Line Company covering operation by it upon the Ohio River between Pittsburgh, Pa., and Cairo, Ill., including intermediate ports, and between Pittsburgh, on the one hand, and ports on the Mississippi River south of Cairo, on the other hand.
2. Through routes and joint rates on classes and commodities between certain points in official territory, on the one hand, and certain Ohio and Mississippi River ports and interior points in the Southwest, on the other hand, over applicant's line and connecting rail carriers via specified ports of interchange, required.

Cornelius Lynde and Andrew P. Calhoun for applicant.

Phil G. Safford for Mississippi Valley Barge Line Company; Charles Donley for Union Barge Line Corporation.

L. P. Day and Herbert S. Harr for rail carriers in central, trunk-line, and New England territories; Walter J. Kelly for rail carriers in central territory; W. N. McGehee for Southern Railway system lines.

A. J. Benson, J. M. Morris, R. H. Reese, M. C. Richards, W. H. Welsh, Fred W. Haas, and M. C. Lysle for various shippers and commercial organizations

Report of the Commission

Division 4, Commissioners Meyer, Eastman, and Mahaffie

By Division 4:

The American Barge Line Company, a corporation organized under the laws of Delaware, is engaged in transportation as a common carrier by water on the Ohio and Mississippi Rivers, operating between points in the Pittsburgh, Pa., district [1] and New Orleans, La., and also receiving or delivering freight at certain intermediate points. By application filed March 20, 1931, as amended, it seeks,

[1] Including Pittsburgh, Glassport, Aliquippa, and Ambridge, Pa. Additional terminals are under development at Colona and Conway, Pa., and will be available to applicant. The term "Pittsburgh" as hereinafter used will be understood to embrace all of the above terminals.

under the provisions of section 3 (e) of the Inland Waterways Corporation Act, as amended May 29, 1928, by the so-called
61 Denison Act, a certificate of public convenience and necessity covering such waterway operations between Pittsburgh and New Orleans, including the movement of traffic to and from all intermediate ports, and the establishment, on all classes and commodities suitable for river transportation, of through barge-rail and rail-barge-rail rates in connection with such river transportation via specified ports of interchange.

Copies of the application were sent to the governors and public-service commissions of the States bordering the above water route, to interested rail carriers, and to the Inland Waterways Corporation, and the Mississippi Valley Barge Line Company, with which water lines the applicant will to some extent compete. Notice of the application was also caused to be published in newspapers of general circulation in the above States. In a sworn return to a questionnaire from us applicant submitted data in support of the application. Neither the State authorities nor the competing water lines offered any objection to the application but comments in general opposition thereto were filed by rail carriers in official and southwestern territories. Hearing on the application was had solely on the question of whether the applicant is entitled to the certificate sought with respect to the waterway operations involved. Rail carriers in official and southern territories appeared at the hearing, or on brief, in opposition to the granting of the certificate.

The applicant was incorporated November 29, 1927, and is authorized by its charter to engage in general transportation by water. It has a fully paid up capital of $2,000,000. It owns terminal facilities at Glassport, Louisville, Ky., and Memphis, Tenn., has a financial interest in terminal facilities at Evansville, Ind., and uses the public dock facilities at New Orleans. Other terminals owned by other water carriers or by industries or rail carriers are available for applicant's use in connection with the through water-and-rail rates which it seeks to have established. It owns 8 tow boats and 69 steel barges, with a total fleet capacity of approximately 40,000 tons. Its approximate investment in terminal facilities is $380,000 and in floating equipment $1,900,000. It transported approximately 400,000 tons in 1929, 300,000 tons in 1930, and 251,000 tons in the first 10 months of 1931. It now has, and since its organization has had, a limited number of joint barge-rail rates obtained through negotiations with rail carriers, and between April 30, 1925, and the date of its organization similar joint rates were in force in connection with one or the other of two companies which were consolidated to form the applicant. Some 100 shippers have availed themselves of the service offered under such rates. Of the total tonnage for
1929 and 1930, approximately 32,350 tons were transported
63 under the limited number of joint barge-rail rates applying via Joppa, Ill., or Memphis as ports of interchange. The balance of the tonnage consisted of port-to-port traffic in common-car-

rier service or under contract. The amount of traffic which will move under the joint rates sought is estimated by applicant at 50,000 tons the first year, 100,000 tons the second year, and 300,000 tons the third year. Applicant's running time is estimated at 8 to 14 days from Pittsburgh to Memphis and 12 to 16 days in the opposite direction; at 5 to 7 days from Memphis to New Orleans and 10 to 15 days in the opposite direction.

Applicant furnishes the only common-carrier water service on that portion of the Ohio River between Pittsburgh and Cincinnati, Ohio. It competes with the Mississippi Valley Barge Line Company between Cincinnati and New Orleans and with the Federal Barge Lines between Cairo, Ill., and New Orleans. Both of these competing water lines, to which certificates under the Denison Act have previously been granted, favor the granting of the certificate. For several years the Federal Barge Lines have maintained joint relationships with applicant as to towing service on the Mississippi River and as to joint-haul water rates. A representative of the Mississippi Valley Barge Line Company suggested the possibility of similar joint arrangements between that carrier and the applicant to their mutual advantage. He also testified, in substance, that while, dependent on the service available at time of shipment, some traffic might be diverted from the Mississippi Valley Barge Line to the applicant's line, the converse would also be true, and that the additional service to the public which would result, including service via that portion of the Ohio River over which the applicant furnishes the only common-carrier service, would tend to encourage and develop the movement of traffic over the water route, including traffic which might not move under higher all-rail rates, but the witness did not specify the traffic which he had in mind in this statement.

The opposing rail carriers state that their facilities are more than adequate to handle all traffic offered for shipment between points which would be affected by the application and stress the adverse effects on their already diminished traffic and earnings which they claim will result from the differential joint rail-and-water rates which would be required to be established if the certificate were granted. These representations are similar to those made by rail carriers in other proceedings of this nature and which we have found not to be such as to warrant the withholding of a certificate to a water line otherwise entitled thereto. Application of Mississippi Valley B. L. Co., 167 I.C.C. 41; 178 I.C.C. 224. Under the Denison Act the establishment of appropriate joint rail-and-water
64 rates, when and if a certificate is granted, flows from the mandate of the statute. The possible effects of such establishment in depriving rail carriers of some traffic and earnings which they otherwise might continue to hold to their lines is a matter of policy which the Congress must be presumed to have taken into consideration in the enactment of the statute and is not a matter which we are authorized to consider in determining whether, solely with respect

to the waterway operations involved, the applicant is entitled to the certificate sought.

In Procedure under Barge Line Act, 148 I.C.C. 129, 135, we held that the waterway operations of the Inland Waterways Corporation, herein referred to as the Federal Barge Lines having been specifically provided for by the Denison Act, the question of public convenience and necessity with respect to such operations was foreclosed by law. In the case of a private barge line, such as the applicant, no such conclusive presumption attaches, but the question of public convenience and necessity must be determined upon a consideration of all the facts and circumstances. The opposing rail carriers point to this distinction and contend that there has been no such showing of public convenience and necessity as would warrant the granting of the certificate. Their contention is based on the theory that in determining the question of public convenience and necessity under the Denison Act the same considerations control as in the case of the construction of a new line of railroad in competition with an existing line of railroad which furnishes adequate service between the points involved, under which circumstances certificates of public convenience and necessity have frequently been denied. We adhere to the conclusion announced in Application of Mississippi Valley B. L. Co., 147 I.C.C. 41, 43, that such an interpretation of the Denison Act is too narrow. The rail carriers' contention that that conclusion was supported only by earlier decisions under the interstate commerce act which are not controlling in construing the provisions of the Denison Act is not a valid one. That conclusion was specifically based upon the provisions of the Denison Act. Furthermore, the issue of public convenience and necessity is one to be determined solely with respect to the waterway operations in question. In addition to furnishing the only common-carrier water service between Pittsburgh and Cincinnati the applicant will furnish the only through common-carrier water service between Pittsburgh, on the one hand, and Ohio and Mississippi River ports west of Cincinnati and south of Cairo, on the other hand. The Government has expended many millions of dollars in improving and developing those waterways with a view to making them adequate for reasonably dependable and regular transportation service and it would clearly be inconsistent with the purpose and intent of the Denison Act to
65 deny to the applicant a certificate covering such operations as those above described. Giving significance and effect to the entire statute, the record also warrants the conclusion that service by the applicant, in addition to the Mississippi Valley Barge Line, on that portion of the Ohio River west of Cincinnati is necessary and desirable in the public interest. The record is not convincing, however, that public convenience and necessity require operation by the applicant between Cairo, on the one hand, and Mississippi River ports south thereof, on the other hand, which portion of the Mississippi River is now served both by the Federal Barge Lines and

the Mississippi Valley Barge Line, nor are the joint rates sought by applicant conditioned on a certificate covering such operation.

Through Routes and Joint Rates

Applicant has outlined its proposal concerning through routes and joint rates in its return to our questionnaire and all interested parties have been given an opportunity to file written comments thereon.

Applicant seeks the establishment between groups specified in the footnote [2] of through barge-rail [3] and rail-barge-rail rates as follows:

Between—	And—	Port or ports of interchange with rail carriers
Barge-rail:		
Group 1	Cincinnati, Ohio, Louisville, Ky., Evansville, Ind., Memphis, Tenn., Helena, Ark., Vicksburg, Miss., Baton Rouge, and New Orleans, La.	Pittsburgh.
Group 2	Memphis, Helena, Vicksburg, Baton Rouge, and New Orleans.	Louisville.
Group 3	Memphis, Helena, Vicksburg, Baton Rouge, and New Orleans.	Evansville.
Rail-barge-rail:		
Group 1	Group 4	Pittsburgh and Memphis.
Do	Group 6	Pittsburgh and New Orleans.
Group 2	Group 5	Louisville and Memphis.
Do	Group 6	Louisville and New Orleans.
Group 3	Group 5	Evansville and Memphis.
Do	Group 6	Evansville and New Orleans.

Rates based upon a minimum differential of 20 percent of the port-to-port rail rates are sought over such routes.

66 In Ex parte No. 96, Through Routes and Joint Rates, 153 I.C.C. 129, a proceeding similar to this and involving the Federal Barge Line, we provided for the establishment of through routes and joint rates subject to certain circuity and other limitations. Those limitations as subsequently modified are embodied in the findings in our fifth supplemental report in that proceeding, 172 I.C.C. 525. No through routes in connection with the barge line were required to be established where the shortest all-rail distance from point of origin to point of destination through the port or ports of interchange exceeded the shortest all-rail distance from the point of origin to point of destination by more than 40 percent in the case of barge-rail routes, and by more than 33⅓ percent in the case of rail-barge-rail routes, nor where the rail portions of such routes exceeded 75 percent, in the case of barge-rail, and 66⅔ percent

[2] Group 1, Pennsylvania, New York, New Jersey, Connecticut, Massachusetts, Rhode Island, and Ohio east of and including stations on Pittsburgh & Lake Erie, Pittsburgh to Youngstown, Erie Railroad, Youngstown to Cleveland, inclusive.

Group 2, Indiana, Michigan, and Ohio west of and including stations on Pittsburgh & Lake Erie, Pittsburgh to Youngstown, Erie Railroad, Youngstown to Cleveland.

Group 3, Indiana, Wisconsin, Illinois, Michigan, and Ohio west of and including stations on the Cleveland, Cincinnati, Chicago & St. Louis Railway, Indianapolis to Toledo via Bellefontaine.

Group 4, all stations in S. W. L. tariff 161, I.C.C. No. 2148.

Group 5, Arkansas and Oklahoma.

Group 6, Texas and Louisiana.

[3] This term as herein used includes also rail-barge.

in case of rail-barge-rail routes. For the establishment of joint rates over the through routes provided for, two bases of differentials were prescribed, namely, 20 percent of the corresponding all-rail rate between the ports where certain limitations [4] as to circuity and the like were not exceeded, and 10 percent of that rate where those limitations were exceeded.

In Application of Mississippi Valley B. L. Co., 167 I. C. C. 41, the water line desired only one basis of differentials as applied to its Cincinnati-New Orleans route, and as that basis was in general not very different from the 20 percent basis prescribed for the Federal Barge Lines, we adopted the more restrictive limitations which had been prescribed in the case of the latter basis. The limitations were subsequently made slightly less restrictive, but no different in principle, in recognition of the fact that the above uniform differential basis was somewhat lower than the 20 percent basis, 171 I.C.C. 37. In the case of additional routes covered by the second supplemental report in that proceeding, 178 I.C.C. 225, both the 20 percent and 10 percent bases of differentials were provided for in accordance with the so-called Ex parte 96 formula.

Considering the situation as between points said by applicant to be representative of its proposed group adjustment, it appears that some of the routes sought would not be required under the Ex parte 96 formula, as for example, from Cleveland, Ohio, (group 1) to Alexandria, La., (group 6) via rail to Pittsburgh, applicant's line
67 from Pittsburgh to New Orleans, and rail beyond, because the distance from Cleveland to Alexandria via the ports of interchange (1,461 miles) exceeds the short all-rail distance from Cleveland to Alexandria (1,067 miles) by more than one third. In numerous other instances the application of the above formula, while providing for the establishment of the through routes sought, would require the joint rates to be based upon a minimum differential of 10 percent of the port-to-port rail rates instead of 20 percent as sought by applicant.

Applicant urges that the group adjustment suggested by it is reasonably necessary in order to place competing shippers upon a substantial parity and that the 20 percent differential basis as applied to traffic between such groups is no more than sufficient to attract a reasonable share of the traffic to the rail-and-water routes sought; that these groups are to be served through ports which call for a substantially direct movement of traffic from point of origin to point of destination; that it is prepared to allow the rail carriers established all-rail divisions to and from the ports of interchange subject to the right to object to any specific division which seems to have

[4] Viz, where the shortest all-rail distance from point of origin to point of destination through the port or ports of interchange does not exceed the shortest all-rail distance from point of origin to point of destination by more than 20 percent, or where the rail portions of such routes do not exceed two thirds of the shortest all-rail distance in the case of barge-rail routes or one half of the shortest all-rail distance in case of rail-barge-rail routes.

been made without reasonable regard to transportation conditions; that self-interest alone, therefore, is sufficient to prevent the applicant from seeking such an ill-adjusted combination of rail-and-water service as would not require a reasonably large portion thereof to be performed by applicant; and that in view of the foregoing considerations, there is no occasion or necessity for imposing in this case such circuity and other limitations as those imposed in Ex parte 96 and similar proceedings.

The grounds urged by applicant in support of its proposed group adjustment, with a uniform differential of 20 percent of the all-rail rates between the ports and without regard to circuity limitations, have been fully considered but are not such as in our opinion to warrant us in imposing upon the rail carriers such a broad requirement as that sought, even though it may be, as claimed by applicant, that the through routes sought do not reflect any greater degree of circuity than that obtaining as between some competing all-rail routes voluntarily established by rail carriers.

The rail carriers in their comments contend that we should not require that the scope of the origin and destination territory be made any greater than would result from the application of the Ex parte 96 formula and that no greater differentials under the all-rail rates should be prescribed than were prescribed in the original and first supplemental report in Application of Mississippi Valley B. L. Co., supra, or than are warranted by comparative costs of transportation, to be determined upon a hearing, over the through rail-and-water route and the all-rail route between the same origin and destination. Under our interpretation of the Denison Act no hearing is contemplated with respect to the matter of the routes and rates which we are authorized to require in a proceeding under that statute.

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In the case of the competing barge lines, the Federal and the Mississippi Valley, we have not required the rail carriers to participate in through routes and joint rates with those water carriers beyond the limitations of the Ex parte 96 formula or beyond those limitations in principle, and no good reason appears why the limitations of that formula should not be prescribed in this proceeding, subject as therein provided, to the use of origin or destination groups if the parties so agree.

In the foregoing discussion of the Ex parte 96 formula we have had in mind its application in connection with routes to, from, or via ports on the lower Mississippi River. We have not heretofore had occasion to consider use of this formula where the water service is performed entirely on the Ohio River. As has been pointed out in other reports, that formula was prescribed in its present form without the aid of a record and was based largely on the scheme for joint rates which had been determined for the Federal Barge Lines by the railroad administration when it was in control of the barge line as well as the rail carriers. As privately owned barge lines have

come into operation on the lower Mississippi in the last few years, it has been a natural development that their rail-barge and rail-barge-rail rates have largely been based on the Ex parte 96 formula. It should be pointed out, however, that we have not used that formula exclusively in fixing rates for the Federal Barge Lines and their rail connections, a notable exception being the decision in Sugar from Louisiana to Arkansas, 167 I.C.C. 710, where we prescribed rates based on constructive distances between barge-line ports.

The Federal Barge Lines are not authorized by law to operate on the Ohio River, and there is as yet no general system of rail-barge rates in effect only via ports on that river. The rates here sought via those ports would be related to the rail rates prevailing in official territory, whereas those previously established on the lower Mississippi have been related to the southern and the southwestern rates. There have long been differential ocean-rail and rail-lake rates between portions of eastern and New England territories on the one hand and certain points in central territory on the other hand, but those rates bear no resemblance to rates produced by the Ex parte 96 formula. The ocean carriers interested in those rates have indicated some apprehension concerning the rail-barge rates to be established to and from central territory, and the situation seems to call for caution in determining a comprehensive system of
68a rail-barge rates for this territory without a record, as we are here required to do. On the whole, it seems preferable not to use the Ex parte 96 formula in making rates via Ohio River ports but to adopt a plan based on constructive mileages akin to that followed in Sugar from Louisiana to Arkansas, supra. Constructive mileages, arrived at in a manner similar to that outlined in the report last cited, which we deem fair for this purpose, are as follows: Pittsburgh-Cincinnati 180 miles, Pittsburgh-Louisville 270 miles, Pittsburgh-Evansville 350 miles.

1. We find that the present and future public convenience and necessity require operation of the American Barge Line Company as a common carrier upon the Ohio River between Pittsburgh and Cairo, including intermediate ports, and between Pittsburgh, on the one hand, and ports on the Mississippi River south of Cairo, on the other hand, but do not require operation by the applicant locally between Cairo, on the one hand, and Mississippi River ports south thereof, on the other hand.

2. We further find that the connecting common carriers by rail listed in the appendix, and their rail connections, should be required to establish, in connection with the American Barge Line Company through routes on classes and commodities as follows: Barge-rail routes between points in the territory included in groups 1, 2, and 3 as described in this report, on the one hand, and lower Mississippi River ports (Memphis, Helena, Vicksburg, Baton Rouge, and New Orleans), on the other hand, via Ohio River ports of interchange (Pittsburgh, Louisville, or Evansville) and rail-barge-rail routes between points in the territory included in said groups 1, 2, and 3, on

the one hand, and points in the territory included in groups 4, 5, and 6, as described in this report, on the other hand, via Ohio River ports of interchange (Pittsburgh, Louisville, or Evansville), on the one hand, and lower Mississippi River ports of interchange (Memphis or New Orleans), on the other hand, except that (a) no barge-rail route need be established where the shortest all-rail distance via the lines of the said rail carriers from point of origin to point of desination through the port of interchange with the barge line exceeds by more than 40 per cent the shortest all-rail distance between such points of origin and destination; (b) no rail-barge-rail route need be established where the shortest all-rail distance from point of origin to point of destination through the ports of interchange with the barge line exceeds by more than 33⅓ per cent the shortest all-rail distance between such points of origin and destination; (c) no barge-rail route need be established where the shortest all-rail distance between the inland point of origin or destination, as the case may be, and the port of interchange exceeds three fourths of the shortest all-rail distance between point of origin and point of destination; (d) no rail-barge-rail route need be established where the sum of the shortest all-rail distance from the point of origin to the port of interchange where the shipment is delivered to the barge line, plus the shortest all-rail distance from the port of interchange where the shipment is relinquished by the barge line to the point of destination, exceeds two thirds of the shortest all-rail distance between origin and destination; (e) no barge-rail or rail-barge-rail route need be established except over the shortest "working" route (i.e., the shortest route regularly used for the transportation of freight traffic in general) between the inland point of origin or destination, as the case may be, and the port of interchange over which the lowest corresponding rate between such points applies; and (f) no barge-rail or rail-barge-rail route need be established if the barge line and the interested rail carriers agree that it shall not be established. In the determination of such through routes, origin or destination groups may be used, if the parties so agree, and in that event distances shall be figured from or to a point centrally located within the group.

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3. We further find that over each of the through routes required in finding 2 said common carriers by rail in connection with the American Barge Line Company shall establish joint rates on all classes and commodities constructed by deducting from the lowest all-rail rate contemporaneously applied on corresponding traffic by said common carriers by rail between point of origin and point of destination via any route the following differentials, which we find to be reasonable minimum differentials: (1) Where, in applying the provisions of finding 2, the excess under (a) is not more than 20 per cent and the fraction under (c) is not greater than two thirds, and where the excess under (b) is not more than 20 percent and the fraction under (d) is not more than one half, 20 percent of the lowest

corresponding all-rail rate between the ports between which the shipment is transported by the barge line; and (2) in all other cases, 10 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by the barge line: provided, however, that no such joint commodity rate need be established where the corresponding all-rail rate over the direct route from or to an interior point to or from a port of destination or origin involves at intermediate points departures from the long-and-short haul provision of the fourth section of the interstate commerce act, nor if the barge line and the interested rail carriers agree that no such joint commodity rate shall be established; and provided further, that no joint barge-rail or rail-barge-rail rate established under our order herein from or to any given point of origin
70 or destination need be lower than the corresponding all-rail rate between such point of origin or destination and the port of interchange. It should be understood that if the all-rail rates on classes other than first or on commodities are determined by applying percentages to the corresponding first-class rates, the joint rates prescribed in this section may be determined by first ascertaining the barge-rail or rail-barge-rail first-class rate, as the case may be, and applying the appropriate percentage thereto.

4. We further find that the connecting common carriers by rail listed in the appendix, and their rail connections, should be required to establish, in connection with the American Barge Line through barge-rail routes on classes and commodities between points in the territory included in group 1, as hereinbefore described, and Ohio River ports (Cincinnati, Louisville, and Evansville) via Pittsburgh: that over each of the through routes required in this finding said common carriers by rail in connection with the American Barge Line Company shall establish joint class rates based on the distance scale and arbitraries set forth in appendices E, F, and I to the report in Eastern Class-Rate Investigation, 164 I.C.C. 314, 171 I.C.C. 481, based on distances arrived at by adding to the short-line all-rail distances from the interior points of origin or destination to Pittsburgh the following constructive distances: Pittsburgh-Cincinnati 180 miles, Pittsburgh-Louisville 270 miles, Pittsburgh-Evansville 350 miles, and that over each of the through routes required in this finding said common carriers by rail in connection with the American Barge Line Company shall establish joint commodity rates determined by deducting from the all-rail commodity rates in effect between the same points differentials for the class rate most nearly corresponding to the all-rail commodity rate or the lower of two class rates equally corresponding: Provided, however, That no such joint commodity rate need be established where the corresponding all-rail rate over the direct route from or to an interior point to or from a point of destination or origin involves at intermediate points departures from the long-and-short haul provision of the fourth section of the Interstate Commerce Act, nor if the American Barge Line Company and interested rail carriers agree that no such joint commodity

rate shall be established, and Provided, further, That no rail-barge route need be established except over the shortest "working" route as hereinbefore defined between the inland point of origin (or destination, as the case may be) and Pittsburgh over which the lowest corresponding rate between such points applies, nor in other cases in which the applicant and the interested rail carriers agree that it should not be established.

71 5. We further find that each of the joint rates ordered to be established in the foregoing finding shall be governed by the same classification and exceptions thereto, and insofar as the transportation takes place on the lines of the said rail carriers by the same general and special rules, regulations, and practices as govern, apply, or are available in connection with the all-rail rates from which the differentials above set forth are deducted in constructing such joint rates, except that such rules and provisions shall be modified with respect to the acceptance of freight, packing requirements, and the like, insofar as may be necessary to meet the circumstances and conditions of transportation by barge.

We further find that within 30 days after the joint rates prescribed above become effective, the said common carriers by rail shall enter into negotiations with the American Barge Line Company for the purpose of agreeing upon equitable divisions of such joint rates; and further, at the expiration of 120 days from the date of publication of the said joint rates, the parties shall advise us in writing as to whether agreement has been reached with respect to such divisions, and if not, the parties shall clearly set forth the rates as to which agreement has not been reached, and shall show the divisions thereof which they consider equitable and their reasons therefor.

An appropriate certificate and order will be entered.

Mahaffie, Commissioner, dissenting.

For the reasons stated in my dissenting expression in application of Mississippi Valley B. L. Co., 182 I.C.C. 512, decided concurrently herewith, I am unable to concur in the findings of the majority in this case.

Appendix

Allegheny and South Side Railway; the Baltimore and Ohio Railroad Company; Buffalo, Rochester and Pittsburgh Railway Company; The Chesapeake and Ohio Railway Company; Chicago and Eastern Illinois Railway Company; Chicago, Indianapolis and Louisville Railway Company; The Chicago, Rock Island and Pacific Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Evansville & Ohio Valley Railway Company (William A. Carson, receiver); Evansville, Suburban & Newburgh Railway Company; Illinois Central Railroad Company; Interstate Public Service Company; Kentucky and Indiana Terminal Railroad Company; Louisiana and Arkansas Railway Company;

Louisiana Southern Railway Company; Louisville and Nashville Railroad Company; Missouri and North Arkansas Railway Company (W. Stephenson, receiver); Missouri Pacific Railroad Company; Missouri Pacific Lines; Mobile and Ohio Rail Road Company; The Monongahela Connecting Railroad; The Nashville, Chattanooga & St. Louis Railway; New Orleans and Lower Coast Railroad Company; New Orleans and Northeastern Railroad Company; New
72 Orleans Great Northern Railroad Company; New Orleans Public Belt Railroad; New Orleans Terminal Company; The Pennsylvania Railroad Company; Pittsburgh, Allegheny & McKees Rock Railroad Company; The Pittsburgh and Lake Erie Railroad Company; The Pittsburgh & West Virginia Railway Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Southern Railway Company; Southern Pacific Company; Texas and New Orleans Railroad Company; Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans; Union Railway Company (Memphis, Tenn.); and the Yazoo and Mississippi Valley Railroad Company.

73

Certificate and Order

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D.C., on the 11th day of March, A.D. 1932

Ex Parte No. 102

Application of American Barge Line Company

Investigation of the matters and things involved in this proceeding having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require the operation of the American Barge Line Company as a common carrier upon the Ohio River between Pittsburgh, Pa. (which term as herein used includes points in the Pittsburgh district named in said report), and Cairo, Ill., including intermediate ports, and between Pittsburgh, on the one hand, and ports on the Mississippi River south of Cairo, Ill., on the other hand.

It is ordered, That the connecting common carriers by rail listed in the appendix and their rail connections be, and they are hereby, directed and required to join with the American Barge Line Company in establishing, on or before June 20, 1932, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, through routes on classes and commodities as follows:

Barge-rail routes between points in the territory included in groups

1, 2, and 3 as described in said report, on the one hand, and lower Mississippi River ports (Memphis, Tenn., Helena, Ark., Vicksburg, Miss., Baton Rouge, La., and New Orleans, La.), on the other hand, via Ohio River ports of interchange (Pittsburgh, Louisville, or Evansville); rail-barge-rail routes between points in the territory included in said groups 1, 2, and 3, on the one hand, and points in the territory included in groups 4, 5, and 6, as described in said report, on the other hand, via Ohio River ports of interchange (Pittsburgh, Louisville, or Evansville), on the one hand, and lower Mississippi River ports of interchange (Memphis or New Orleans), on the other hand: Provided, however, That (a) no such barge-rail route need be established where the shortest all-rail distance via the lines of the said rail carriers from point of origin to point of destination through the port of interchange with said American Barge Line Company exceeds by more than 40 percent the shortest all-rail dis-
74 tance between such points of origin and destinations; (b) no rail-barge-rail route need be established where the shortest all-rail distance from point of origin to point of destination through the ports of interchange with said American Barge Line Company exceeds by more than 33⅓ percent the shortest all-rail distance between such points of origin and destination; (c) no barge-rail route need be established where the shortest all-rail distance between the inland point of origin or destination, as the case may be, and the port of interchange exceeds three fourths of the shortest all-rail distance between point of origin and point of destination; (d) no rail-barge-rail route need be established where the sum of the shortest all-rail distance from the point of origin to the port of interchange where the shipment is delivered to said American Barge Line Company, plus the shortest all-rail distance from the port of interchange where the shipment is relinquished by said American Barge Line Company to the point of destination, exceeds two thirds of the shortest all-rail distance between origin and destination; (e) no barge-rail or rail-barge-rail route need be established except over the shortest "working" route (i.e., the shortest route regularly used for the transportation of freight traffic in general) between the inland point of origin or destination, as the case may be, and the port of interchange over which the lowest corresponding rate between such points applies; and (f) no barge-rail or rail-barge-rail route need be established if said American Barge Line Company and the interested rail carriers agree that it shall not be established.

It is further ordered, That said common carriers by rail, parties to the through routes prescribed in the next preceding paragraph hereof, be, and they are hereby, directed and required to join with said American Barge Line Company in establishing, on or before June 20, 1932, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, joint rates applicable over said through routes, constructed by deducting from the lowest all-rail rate contemporaneously applicable on correspond-

ing traffic over any route between the same points of origin and destination the following differentials: (a) Where over barge-rail routes the shortest all-rail distance via the lines of the connecting rail carriers from point of origin to point of destination through the port of interchange does not exceed the shortest rail distance between such points of origin and destination by more than 20 percent, where over barge-rail routes the shortest all-rail distance between the inland point of origin or destination and the port of interchange does not exceed two thirds of the shortest all-rail distance, where over rail-barge-rail routes the short all-rail distance from point of
75 origin to point of destination through the port of interchange does not exceed by more than 20 percent the shortest rail distance between such points of origin and destination, and where over rail-barge-rail routes the total rail haul is not more than one half of the shortest all-rail distance between point of origin and destination, 20 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by said American Barge Line Company; and (b) in all other cases, 10 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by said American Barge Line Company: Provided, however, That no such joint commodity rate need be established where the corresponding all-rail rate over the direct route from or to an interior point to or from a port of destination or origin involves at intermediate points departures from the long-and-short-haul provision of the fourth section of the Interstate Commerce Act nor if said American Barge Line Company and the interested rail carriers agree that no such joint commodity rate shall be established: And provided further, That no joint barge-rail or rail-barge-rail rate established under this order from or to any given point of origin or destination need be lower than the corresponding all-rail rate between such point of origin or destination and the port of interchange.

It is further ordered, That the common carriers by rail listed in the appendix and their rail connections be, and they are hereby, directed and required to joint with said American Barge Line Company in establishing, on or before June 20, 1932, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, through routes on classes and commodities between points in the territory included in group 1, as described in said report, on the one hand, and Ohio River ports (Cincinnati, Louisville, and Evansville), on the other hand, via Pittsburgh: Provided, however, That no such route need be established except over the shortest "working" route (i.e., the shortest route regularly used for the transportation of freight traffic in general) between the inland point of origin or destination, as the case may be, and Pittsburgh, nor in other cases in which said American Barge Line Company and interested rail carriers agree that it shall not be established.

It is further ordered, That said common carriers by rail parties to the through routes prescribed in the next preceding paragraph hereof be, and they are hereby, directed and required to join with said American Barge Line Company in establishing on or before June 20, 1932, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, joint
76 class rates based on the distance scale and arbitraries set forth in Appendixes E, F, and I to the report in Eastern Class-Rate Investigation, 164 I.C.C. 314, 171 I.C.C. 481, for distances determined by adding to the short-line all-rail distances from the interior points of origin or destination to Pittsburgh the following constructive distances: Pittsburgh-Cincinnati 180 miles, Pittsburgh-Louisville 270 miles, Pittsburgh-Evansville 350 miles, and joint commodity rates determined by deducting from the all-rail commodity rates in effect between the same points differentials for the class rates most nearly corresponding to the all-rail commodity rate or the lower of two class rates equally corresponding: Provided, however, That no such joint commodity rate need be established where the corresponding all-rail rate over the direct route from or to an interior point to or from a point of destination or origin involves at intermediate points departures from the long-and-short-haul provisions of the fourth section of the Interstate Commerce Act, nor if the said American Barge Line Company and interested rail carriers agree that no such joint commodity rate shall be established.

It is further ordered, That the joint rates hereinbefore prescribed shall be governed by the same classification and exceptions thereto, and insofar as the transportation takes place on the lines of the rail carriers, by the same general and special rules, regulations, and practices as govern, apply, or are available in connection with the all-rail rate on which the different rates hereinbefore prescribed are based, except that such rules, regulations, and practices shall be modified with respect to the acceptance of freight, packing requirements, and the like, insofar as may be necessary to meet the circumstances and conditions of barge transportation.

It is further ordered, That the interested carriers be, and they are hereby, directed and required within 30 days from the date when the joint rates hereinbefore prescribed become effective to enter into negotiations with said American Barge Line Company for the purpose of establishing equitable divisions of such joint rates, and the said carriers and said American Barge Line Company be, and they are hereby, directed and required to inform the commission within 120 days from date of publication of said rates whether they have been able to agree upon equitable divisions of said rates, and, if they have been unable to agree, to state the divisions which they respectively consider equitable and their reasons therefor.

And it is further ordered, That this order shall continue in effect until the further order of the commission, or until the rates, routes,

regulations, and practices hereinbefore prescribed are changed by agreement of the interested parties.

By the commission, division 4. GEORGE B. McGINTY.
[SEAL.] *Secretary.*

77

Exhibit "B" to answer I.C.C.

17862

Interstate Commerce Commission

Ex Parte No. 102

Application of American Barge Line Company

Decided June 14, 1932

Additional through barge-rail rates and joint rates on classes and commodities over applicant's line and connecting rail carriers required. Prior report, 182 I.C.C. 521.

Supplemental Report of the Commission

Division 4, Commissioners Meyer, Eastman, and Mahaffie

By Division 4:

In our original report of March 11, 1932, herein 182 I.C.C. 521, we granted a certificate of public convenience and necessity to applicant as a water carrier upon the Ohio and Mississippi Rivers between Pittsburgh, Pa., and New Orleans, La., except that the certificate did not cover operation locally between Cairo, Ill., and Mississippi River ports south thereof. We also required the establishment of through routes and joint rates between certain points in official territory, on the one hand, and certain Ohio and Mississippi River ports and interior points in the Southwest, on the other hand, over applicant's line and connecting rail carriers via specified ports of interchange on the Ohio and Mississippi Rivers. No routes and rates were requested by applicant between Ohio River ports and interior points in the Southwest and accordingly none were prescribed.

By petition filed May 17, 1932, applicant seeks the establishment of through rates and joint differential rates on classes and commodities between Ohio River ports (Pittsburgh, Cincinnati, Ohio, Louisville, Ky., and Evansville, Ind.) and points in groups 4, 5, and 6 (comprising certain interior points in the Southwest as described in the original report) via Memphis, Tenn., and New Orleans.

Applicant explains that it inadvertently failed to include such a request in its original application. The interested southwestern carriers were served with copies of the petition. They have submitted no formal comments with respect thereto but correspondence filed in the docket indicates that they are unwilling to join in the

establishment of such routes and rates unless specifically ordered by us.

The rates prescribed in our original report for application to, from, or via lower Mississippi River ports, were based on the
78 so-called Ex parte No. 96 formula described in that report. The use of the same basis appears to be apropriate for determining the additional routes and rates here sought.

We find that the connecting common carriers by rail listed in the appendix to the original report in this proceeding, and their rail connections, should be required to establish, in connection with the American Barge Line Company, through barge-rail routes and joint rates on classes and commodities between Ohio River ports (Pittsburgh, Cincinnati, Louisville, and Evansville) and points in the territory included in groups 4, 5, and 6, as described in the original report, via lower Mississippi River ports of interchange (Memphis and New Orleans), in accordance with the same provisions, and subject to the same exceptions and limitations, as those set forth in the original report and order in connection with the barge-rail through routes and joint rates therein prescribed to, from, and via lower Mississippi River ports.

We further find that within 30 days after the joint rates prescribed above become effective, the said common carriers by rail shall enter into negotiations with the American Barge Line Company for the purpose of agreeing upon equitable divisions of such joint rates; and further, at the expiration of 120 days from the date of publication of the said joint rates, the parties shall advise us in writing as to whether agreement has been reached with respect to such divisions, and if not, the parties shall clearly set forth the rates as to which agreement has not been reached, and shall show the divisions thereof which they consider equitable and their reasons therefor.

An appropriate supplemental order will be entered.

Mahaffie, Commissioner, concurring:

I concur in this report subject to the conditions stated in my separate expression in the original report herein.

79 Supplemental Order

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D.C., on the 14th day of June, A.D. 1932

Ex Parte No. 102

Application of American Barge Line Company

Said division having, on the date hereof, made and filed a supplemental report in the above-entitled proceeding, containing its further findings and conclusions thereon, which said report, together with the original report in 182 I.C.C. 521, is hereby referred to and made a part hereof:

It is ordered, That the connecting common carrier by rail listed in the appendix to said original report, and their rail connections, be, and they are hereby, directed and required to join with the American Barge Line Company in establishing, on or before August 20, 1932, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, through barge-rail routes and joint rates on classes and commodities between Ohio River ports (Pittsburgh, Pa., Cincinnati, Ohio, Louisville, Ky., and Evansville, Ind.) and points in the territory included in groups 4, 5, and 6, as described in said original report, via lower Mississippi River ports of interchange (Memphis, Tenn., and New Orleans, La.) in accordance with the same provisions, and subject to the same exceptions and limitations, as those set forth in the original report and order in connection with barge-rail through routes and joint rates therein prescribed to, from, and via lower Mississippi River ports.

It is further ordered, That the interested carriers be, and they are hereby, directed and required within 30 days from the date when the joint rates hereinbefore prescribed become effective to enter into negotiations with said American Barge Line Company for the purpose of establishing equitable divisions of such joint rates, and the said carriers and said American Barge Line Company be, and they are hereby, directed and required to inform the commission within 120 days from date of publication of said rates whether they have been able to agree upon equitable divisions of said rates, and, if they have been unable to agree, to state the divisions which they respectively consider equitable and their reasons therefor.

80 And it is further ordered, That this order shall continue in effect until the further order of the commission, or until the rates, routes, regulations, and practices hereinbefore prescribed are changed by agreement of the interested parties.

By the commission, division 4.

[SEAL.]

GEORGE B. MCGINTY,
Secretary.

81 *Exhibit "C" to answer of I.C.C.*

Order

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 18th day of January, A.D. 1933

Ex Parte No. 102

Application of American Barge Line Company

Upon consideration of a petition of southwestern rail carriers, respondents in the above-entitled proceeding, dated December 30, 1932, praying for vacation of the order of December 10, 1932, in

said proceeding, for reopening, consideration by the entire commission, and hearing, and dismissal of applicant's petitions, and of a petition of said respondents dated January 7, 1933, praying for postponement of the effective date of said order:

It is ordered, That the petition for vacation of order, reopening, hearing, and dismissal, be, and it is hereby denied: Provided, That the action herein is without prejudice to respondents' right to a summary hearing concerning the reasonableness of the through routes, joint rates, and minimum differentials prescribed in the order of March 11, 1932, in said proceeding, as amended by said order of December 10, 1932, upon complaint filed as authorized by the Inland Waterways Corporation Act.

It is further ordered, That the effective date of said order of December 10, 1932, as amended, be, and it is hereby, further postponed until February 21, 1933.

And it is further ordered, That in all other respects said order of December 10, 1932, as amended, shall continue in effect until the further order of the commission.

By the commission.

[SEAL.]

GEORGE B. MCGINTY,
Secretary.

82 [File endorsement omitted.]

83 In United States District Court

[Title omitted.]

Petition of Inland Waterways Corporation for leave to intervene as a party defendant

Filed Feb. 27, 1933

To the honorable the Justices of the District Court of the United States for the District of Delaware, holding a court of equity:

This petitioner, the Inland Waterways Corporation, respectfully alleges:

I

That petitioner is a corporation wholly owned by the Federal Government and created under an act of Congress (Public No. 185, Sixty-eighth Cong., 43 Stat. 360–362, 49 U.S.C., sections 151–156), and, as such, petitioner owns and operates Federal barge lines in the business of common carriage of freight on the Mississippi River and certain of its tributaries, on the Industrial Canal, the
84 Mississippi Sound, and the Mobile, the Tombigbee, the Warrior and the Black Warrior Rivers, serving many ports of call on said rivers, each of which ports is also served by one or more common carriers by rail, including many of the plaintiffs herein, and that at each of said ports there exist terminal facilities for the

interchange of freight between the craft of this petitioner and rail carriers.

II

That it has a substantial interest in the subject of the action involved in the above numbered and entitled cause, which interest is adverse to that of the plaintiffs, and it is entitled to intervene in said cause.

III

That under the provisions of sections 2 (e) of the act of Congress approved May 29, 1928 (Public, No. 601, 70th Cong., 45 Stat. 978), amending section 3 of the aforesaid act under which said corporation was created, it has heretofore applied to the Interstate Commerce Commission and has secured from said Commission a certificate of convenience and necessity, as contemplated in said last-mentioned act, together with orders of said Commission requiring each and all of the railroads, plaintiffs herein, and other railroads and their rail connections to join with it in the establishment of through rates in connection with it from and to all points
85 served by them, and requiring all of said common carriers by rail connecting with it and the rail connections of such common carriers to establish joint rates on all classes of commodities applicable over the routes defined by said Commission in said orders, such rates to be constructed by deducting from the lowest all-rail rate contemporaneously applicable on corresponding traffic over any route between the same points of origin and destination differentials as prescribed by the said Commission in said orders. That the initial order of said Commission so affecting this petitioner was entered by said Commission on April 8, 1929, and that, since said date said Commission has entered its various orders substantially of the same nature as those above described so that at the present time a large amount of the business of petitioner in the common carriage of freight on said rivers moves via routes and on joint rates prescribed by the said Commission under the orders above referred to. That each and all of said orders of the said Commission were made and were based upon the authority contained in section 3 (e) of the act of Congress first above referred to as amended by the act of Congress next above referred to.

IV

That if this honorable court shall sustain either of the contentions of plaintiff in this case, namely, the contention made by plaintiffs in their paragraphs VIII, IX, or X, the effect will be to render questionable the validity of all the aforesaid orders of the said
86 Commission respecting the business of this intervenor if, indeed, such holding does not render all of said orders of the Commission invalid.

V

That the operating revenues of this petitioner are, in a very large part, derived from the business of common carriage of freight conducted by this petitioner under the aforesaid orders of the Interstate Commerce Commission, and if said orders and their validity are disturbed by the conclusions reached by your honorable court in this case, the revenues upon which this petitioner relies for its financial existence will be seriously depleted.

VI

That this petitioner is informed and believes, hence so alleges, that in the event the aforesaid contentions of plaintiffs are sustained they will withdraw from participation with this petitioner and this barge line in said through routes and joint rates so ordered by said Commission and now in effect and will refuse to negotiate with this petitioner looking to the establishment of additional joint routes and rates in connection with the barge line of this petitioner under the said orders of said Commission.

VII

That this petitioner has been assured by the attorneys for the aforesaid plaintiffs that plaintiffs neither oppose nor consent
87 to intervention in this cause by the Inland Waterways Corporation and that plaintiffs waive notice of filing of this Motion.

VIII

That this petition is based upon the District Court Jurisdiction Act.

Wherefore this petitioner prays:

That your honorable court enter its order permitting this petitioner to intervene in said cause as a party-defendant for the purpose of taking such action as may be expedient for it to take in order to protect its rights therein, and that its answer in intervention which accompanies this petition be ordered filed in the papers of said cause and that all proper and requisite process, except insofar as it has been or may be waived by the other parties to this cause, do issue on account of this petition and have such further relief as this petitioner may be entitled to.

(Sgd.) CLARK C. WREN,
Solicitor for Intervenor: Inland Waterways Corporation,
1016 Munitions Building, Washington, D.C.

88 [*Duly sworn to by T. Q. Ashburn, jurat omitted in printing.*]

90 In United States District Court

[Title omitted.]

Order permitting intervention of inland waterways corporation as party defendant

Filed Feb. 27, 1933

This cause coming on to be heard upon motion made by counsel for the petitioner, Inland Waterways Corporation, in the above-entitled cause, it is by the court the 27 day of February, 1933,

Ordered that the Inland Waterways Corporation be, and it is hereby, permitted to intervene in the above-entitled cause as a party defendant; that it be, and is hereby, permitted to take and adopt the answer of the defendant, the Interstate Commerce Commission, as its answer to the bill of complaint, making in its own behalf the same admissions and allegations as are made in the said answer of the said defendant, the Interstate Commerce Commission.

(Sgd.) J. W. THOMPSON,
Circuit Judge.
(Sgd.) O. B. DICKINSON,
District Judge.
(Sgd.) JOHN P. NIELDS,
District Judge.

We accept notice of motion of the intervenor and interpose no objection to granting of this order.

(Sgd.) H. H. LARIMORE.
(Sgd.) E. A. SMITH,
(Sgd.) R. S. OUTLAW,
Attorney for the Plaintiffs.
(Sgd.) ELMER B. COLLINS,
Attorney for Defendant, United States of America.
(Sgd.) H. L. UNDERWOOD,
Attorney for Defendant, Interstate Commerce Commission.

91 [File endorsement omitted.]

92 In United States District Court

[Title omitted.]

Answer of intervenor Inland Waterways Corporation

Filed Feb. 27, 1933

Comes now the above-mentioned intervenor and, with leave of court first had and obtained, files this its answer as an intervening

defendant in the above-entitled and numbered cause. For answer this intervenor says:

I

That it is a corporation organized as such under an act of Congress with its principal place of business at 1016 Munitions Building, Washington, D.C., where service on it may be had.

II

For its answer herein this intervenor adopts the answer of the Interstate Commerce Commission, one of the defendants in said cause, or so much thereof as may be pertinent to be taken as the answer of this intervenor, and this intervenor makes, in its own behalf, each and all of the admissions and allegations made by the said Interstate Commerce Commission in its answer herein.

93 Wherefore this intervenor prays that all proper and requisite process, with the exception of that which has been or may be waived by the other parties to this proceeding, do issue on account of this answer and that upon hearing of this cause the plaintiffs be denied the relief prayed for by them and that this intervenor have judgment against said plaintiffs for its costs in this behalf incurred and for such further relief as intervenor may show itself entitled to.

(Sgd.) CLARK C. WREN,
Solicitor for Intervenor, Inland Waterways Corporation,
1016 Munitions Building, Washington, D.C.

[*Duly sworn to by T. Q. Ashburn, jurat omitted in printing.*]

94 [File endorsement omitted.]

95 In United States District Court

[Title omitted.]

Petition for leave to intervene as a party defendant

Filed Feb. 27, 1933

To the honorable the Justices of the District Court of the United States for the District of Delaware, holding a court of equity:

The petitioner, the American Barge Line Company, respectfully shows unto the court the following facts:

1. That the petitioner is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business at Louisville, State of Kentucky.

2. That the petitioner operates a barge line, and is engaged as a common carrier by water on the Ohio and Mississippi Rivers be-

tween Pittsburgh in the State of Pennsylvania, and New Orleans in the State of Louisiana, and receives and delivers freight at intermediate points between those two cities.

3. That the petitioner is the company mentioned and re-
96 ferred to in the bill of complaint in paragraphs I, sec. 4; II; III, sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10; V, 1, 2. IX, thereof.

4. That if the relief requested by the plaintiffs is granted, it will seriously and irreparably impair and, in fact, may completely destroy certain of the investments of the petitioner.

5. That by reason of the facts herein stated, and by reason of the facts alleged in the bill of complaint, any action taken by the court on the bill of complaint would materially affect the interest of your petitioner.

6. That this petition is based upon the District Court Jurisdiction Act (Judicial Code, title 28, section 45-a).

Wherefore, the premises considered, your petitioner prays:

1. That it be allowed to intervene in this proceeding as a party defendant for the purpose of taking such action as may be expedient for it to take in order to protect its rights therein.

2. That the answer filed by the defendant, the Interstate Commerce Commission, to the bill of complaint, or so much thereof as may be necessary and pertinent be taken and adopted as the answer of your petitioner.

AMERICAN BARGE LINE COMPANY,
By (Signed) ANDREW P. CALHOUN,
Vice President.

ESCH, KERR, WOOLLEY, TAYLOR & SHIPE.
By (Signed) JOHN J. ESCH,
Attorney for Intervenor.

[*Duly sworn to by Andrew P. Calhoun, jurat omitted in printing.*]

97 [File endorsement omitted.]

98 In United States District Court

[Title omitted.]

Order permitting intervention of American Barge Line Company as party defendant

Filed Feb. 27, 1933

This cause coming on to be heard upon motion made by counsel for the petitioner, American Barge Line Company, in the above-entitled cause, it is by the court the 27th day of February, 1933,

Ordered, that the American Barge Line Company be, and it hereby is, permitted to intervene in the above-entitled cause as a party defendant; that it be, and hereby is, permitted to take and

adopt the answer of the defendant, the Interstate Commerce Commission, as its answer to the bill of complaint.

(Sgd.) J. W. THOMPSON,
Circuit Judge.
(Sgd.) O. B. DICKINSON,
District Judge.
(Sgd.) JOHN P. NIELDS,
District Judge.

99 We accept notice of motion of the intervenor and interpose no objection to granting of this order.

(Sgd.) ELMER B. COLLINS,
Attorney for United States.
(Sgd.) H. L. UNDERWOOD,
Attorney for Interstate Commerce Commission.

[File endorsement omitted.]

100 In United States District Court

[Title omitted.]

Petition for leave to intervene as a party defendant

Filed Feb. 27, 1933

To the honorable the Justices of the District Court of the United States for the District of Delaware, holding a court of equity:

The petitioner, Mississippi Valley Barge Line Company, respectfully shows unto the court the following facts:—

1. That the petitioner is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business at St. Louis, State of Missouri.

2. That the petitioner operates a barge line, and is engaged as a common carrier by water on the Mississippi River between New Orleans, in the State of Louisiana, and St. Louis, in the State of Missouri, and between the city of New Orleans, in the State of Louisiana, and the city of Cincinnati, in the State of Ohio, and receives and delivers freight at intermediate points between those cities.

101 3. That the petitioner is vitally interested in freight rates, both rail and water, applicable to the territory served by it; that the petitioner is interested in having retained the proper differentials in rates for freight transported in commerce by rail and water in the territory served by it.

4. That if the relief requested by the plaintiffs is granted, it will seriously and irreparably impair, and, in fact, it may completely destroy the investment of the petitioner.

5. That once the transportation on the Mississippi and Ohio Rivers ceased, the petitioner believes and alleges that the rail rates would be increased to a dry-land basis.

6. That by reason of the facts herein stated, and by reason of the facts alleged in the bill of complaint, any action taken by the court on the bill of complaint would materially affect the interest of your petitioner.

7. That the petitioner is a certified common carrier, subject to regulation by the Interstate Commerce Commission.

8. That this petition is based upon the District Court Jurisdiction Act (Judicial Code, title 28, section 45-a).

Whereas the premises considered, your petitioner prays:

1. That it be allowed to intervene in this proceeding as a party defendant for the purpose of taking such action as may be expedient for it to take in order to protect its rights therein.

2. That the answer filed by the defendant, the Interstate Commerce Commission, to the bill of complaint, or so much thereof as may be necessary and pertinent be taken and adopted as the answer of your petitioner.

MISSISSIPPI VALLEY BARGE LINE COMPANY,
By (Sgd.) L. W. CHILDRESS, *President, Mississippi Valley Barge Line Company, St. Louis, Missouri.*

102 ESCH, KERR, WOOLLEY, TAYLOR & SHIPE,
By JOHN J. ESCH,
Attorney for Intervener,
736 Transportation Building, Washington, D.C.

[*Duly sworn to by L. W. Childress, jurat omitted in printing.*]
[File endorsement omitted.]

103 In United States District Court

[Title omitted.]

Order permitting intervention of Mississippi Valley Barge Line as party defendant

Filed Feb. 27, 1933

This cause coming on to be heard upon motion made by counsel for the petitioner, Mississippi Valley Barge Line, in the above-entitled cause, it is by the court this 27th day of February 1933,

Ordered that the Mississippi Valley Barge Line be, and it hereby is, permitted to intervene in the above-entitled cause as a party defendant; that it be, and hereby is, permitted to take and adopt the answer of the defendant, the Interstate Commerce Commission, as its answer to the bill of complaint.

(Sgd.) J. W. THOMPSON,
Circuit Judge.
(Sgd.) O. B. DICKINSON,
District Judge.
(Sgd.) JOHN P. NIELDS,
District Judge.

We accept notice of motion of the intervener and interpose no objection to granting of this order.

(Sgd.) ELMER B. COLLINS,
Attorney for United States.
(Sgd.) H. L. UNDERWOOD,
Attorney for Interstate Commerce Commission.

[File endorsement omitted.]

104 In United States District Court

[Title omitted.]

Petition for leave to intervene as a party defendant

Filed Feb. 27, 1933

To the honorable the Justices of the District Court of the United States for the District of Delaware, holding a court of equity:

The petitioner, the Mississippi Valley Association, respectfully shows unto the court the following facts:

1. That the petitioner is an association, duly incorporated and existing under and by virtue of the laws of the State of Louisiana, with its principal place of business at St. Louis, State of Missouri.

2. That the petitioner is interested in freight rates which will develop industry and promote commerce in the Mississippi Valley States; that the petitioner is interested in having retained a proper differential in rates for freight transported in commerce in the Mississippi Valley States by rail and water.

105 3. That petitioner believes and avers that should the relief prayed for by plaintiff be granted, continued operation of barge lines on the Mississippi and Ohio Rivers, would be seriously jeopardized, if not entirely discontinued.

4. That once the transportation on the Mississippi and Ohio Rivers ceased, the rail rates would be increased to a dry-land basis.

5. That by reason of the facts herein stated and by reason of the allegations in the bill of complaint, any action taken by the court on the bill of complaint would materially affect the interest of shippers in the Mississippi Valley States, and would materially affect the developing and promoting of industries in those States, all of which are of material interest to your petitioner.

6. That this petition is based upon the District Court Jurisdiction Act (Judicial Code, title 28, section 45-a).

Wherefore, the premises considered, your petitioner prays:

1. That is be allowed to intervene in this proceeding as a party defendant for the purpose of taking such action as may be expedient for it to take in order to protect its rights therein.

2. That the answer filed by the defendant, the Interstate Commerce Commission, to the Bill of Complaint, or so much thereof

as may be necessary and pertinent, be taken and adopted as the answer of your petitioner.

MISSISSIPPI VALLEY ASSOCIATION,
By (Sgd.) LACHLAN MACLEAY,
Executive Vice-President, Chamber of Commerce Building, 511 Locust Street, St. Louis, Missouri.
ESCH, KERR, WOOLLEY, TAYLOR & SHIPE,
By (Sgd.) JOHN J. ESCH,
Attorney for Intervener, 736 Transportation Building, Washington, D.C.

106 [*Duly sworn to by Lachlan Macleay, jurat omitted in printing.*]

[File endorsement omitted.]

107 In United States District Court

[Title omitted.]

Order permitting intervention of Mississippi Valley Association as party defendant

Filed Feb. 27, 1933

This cause coming on to be heard upon motion made by counsel for the petitioner, Mississippi Valley Association, in the above-entitled cause, it is by the court this 27th day of February 1933,

Ordered that the Mississippi Valley Association be, and it hereby is, permitted to intervene in the above-entitled cause as a party defendant; that it be, and hereby is, permitted to take and adopt the answer of the defendant, the Interstate Commerce Commission, as its answer to the bill of complaint.

(Sgd.) J. W. THOMPSON,
Circuit Judge.
(Sgd.) O. B. DICKINSON,
District Judge.
(Sgd.) JOHN P. NIELDS,
District Judge.

We accept notice of motion of the intervener and interpose no objection to granting of this order.

(Sgd.) ELMER B. COLLINS,
Attorney for United States.
(Sgd.) H. L. UNDERWOOD,
Attorney for Interstate Commerce Commission.

108 [File endorsement omitted.]

109 [File endorsement omitted.]

110 In United States District Court

[Title omitted.]

Affidavit of J. R. Staley

Filed February 23, 1933

J. R. Staley, being duly sworn, upon his oath states that he is general freight agent for the Missouri Pacific Railroad Company, one of the plaintiffs in the above-entitled cause. That he has been connected with the said Missouri Pacific Railroad Company for substantially five and one half years last past, all of which period has been spent by him in the traffic department of such railroad company.

111 Affiant also states that he has had approximately ten years experience in traffic matters, with special regard to rates in force via the lines of common carriers by railroad in the United States; has, during such period last named, been in continuous and daily contact with traffic matters and rates via such lines of railroad and has had particular experience in connection with rates on cotton via railroad between points in the Southwest and between points in the Southeast, on the one hand, and points in the United States generally, on the other.

Affiant makes this affidavit on behalf of Missouri Pacific Railroad Company, The Chicago, Rock Island and Pacific Railway Company, St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, receivers), St. Louis Southwestern Railway Company, and The Kansas City Southern Railway Company, plaintiffs in the above-entitled cause, and states that he is authorized to make such affidavit on the part of all of said common carriers by railroad just before named.

Affiant also states that by reason of his experience as heretofore set out he has personal knowledge of the location of the lines of railroad operated by the carriers above named, the communities and localities served by such lines of railroad, and has particular knowledge of the rates in effect via such lines of railroad, in so far as the transportation of cotton is concerned.

That lines of railroad operated by The Kansas City Southern Railway Company, The Chicago, Rock Island and Pacific Railroad Company, St. Louis-San Francisco Railway Company (J. M.

112 Kurn and John G. Lonsdale, receivers), St. Louis Southwestern Railway Company and Missouri Pacific Railroad Company serve generally points in the State of Arkansas, and that through their lines of railroad The Chicago, Rock Island and Pacific Railway Company, St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, receivers), St. Louis Southwestern Railway Company and Missouri Pacific Railroad Company serve

the City of Memphis, Tennessee. That Missouri Pacific Railroad Company, St. Louis Southwestern Railway Company and St. Louis-San Francisco Railway Company have lines of railroad, and at all times herein mentioned did have such lines of railroad, extending from Memphis, Tennessee, to St. Louis, Missouri, at which points such lines of railroad connect with other lines of railroad extending eastwardly from said St. Louis.

Affiant states that on and prior to August 29, 1932, and at all times since such last-named date, Missouri Pacific Railroad Company, The Chicago, Rock Island and Pacific Railway Company, St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, receivers), St. Louis Southwestern Railway Company, and The Kansas City Southern Railway Company participated, and now participate, in joint all-rail rates on cotton, any quantity, from points in the State of Arkansas to points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, on the basis generally prescribed by the Interstate Commerce Commission in a certain proceeding before that body known as Rate Structure Investigation, I.C.C. Docket No.
113 17,000, part 3, Cotton, and reported at 165 I.C.C. 595, and supplemental reports, and that all of such carriers last above named, except The Chicago, Rock Island and Pacific Railway Company and The Kansas City Southern Railway Company, during the period named and now participated, and participate, in joint rates on cotton, in any quantity, from Memphis, Tennessee, to points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, established generally on the basis prescribed by the Commission in said Docket No. 17,000, part 3. That said any quantity rates last before described on cotton were, and are, normal rates and were maintained and are now maintained by the carriers as reasonable maximum rates.

Affiant states that on August 29, 1932, the before-mentioned carriers and other carriers by railroad established carload rates on cotton from points in Arkansas and from Memphis, Tennessee, to the destination States before described because of severe competition from unregulated trucks and carriers by water upon a basis materially lower than the any-quantity rates on cotton theretofore and then prevailing and hereinbefore particularly described, and on November 16, 1932, further reduced said carload rates on cotton in the belief that such further reduced rates were necessary to meet the competition above referred to, and that such carload rates so established are not reasonable maximum rates, but, on the contrary, are depressed rates, necessary to meet existing unregulated movement by truck or water, or both.

Affiant states that there is now a movement of cotton in carloads
114 via all-rail routes from points in Arkansas and Memphis, Tennessee, to points in the destination territory heretofore referred to under the carload rates established as heretofore

[illegible] which the carriers by railroad earn and divide all-rail revenue.

That by a report and order, dated December 10, 1932, the Interstate Commerce Commission, upon applications of the American Barge Line Company in Docket Ex Parte No. 102, on a date specified in such order, required all of the carriers by railroad hereinbefore named and for which affiant is authorized to speak to participate in rail-barge-rail rates on cotton, in carloads, from points in Arkansas to points in the destination territory heretofore described lower than existing carload rates on cotton then in effect and heretofore specifically described. That the rail-barge-rail rates from points in Arkansas required to be established by the said Commission were based on the following differentials under the corresponding all-rail rates:

8 cents, minimum 25,000–40,000 pounds;
6 cents, minimum 35,000–55,000 pounds;
4 cents, minimum 50,000–80,000 pounds.

By the same report and order the Commission required to be established a barge-rail rate on cotton, in carloads, minimum 37,000 pounds, from Memphis, Tennessee, to the destination territory heretofore described for application over barge-rail routes based on the differential of 6 cents under the all-rail rate on cotton, in carloads, from Memphis, Tennessee, to such destination territory then in effect.

Affiant states that in its orders as aforesaid requiring the
115 establishment and maintenance of the rail-barge-rail rates as aforesaid to be participated in as aforesaid by the carriers by railroad heretofore mentioned, the Commission did not require that the difference in rates, rail-barge-rail and under all-rail rates, should be borne by the barge line, and the result will be that if such rail-barge-rail rates on cotton, in carloads, are established as required by the Commission, carriers by railroad participating therein will receive lower revenue and less money for the transportation of cotton, in carloads, via rail-barge-rail routes than they would receive if such cotton moved via all-rail routes.

Affiant further states as regards the movement of cotton from Memphis, Tennessee, to the destination territory here involved, that if and when cotton moves from Memphis, Tennessee, to points in the destination territory here affected under the barge-rail rates required to be established as aforesaid, the Missouri Pacific Railroad Company, St. Louis Southwestern Railway Company and the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, receivers) will be denied the use of their lines extending from Memphis, Tennessee, to St. Louis, Missouri, in connection with the movement of such cotton, and will, therefore, be deprived of transporting such cotton, which would otherwise move via all-rail routes and over the lines of the carriers by railroad just named from Memphis, Tennessee, to St. Louis, Missouri, and affiant states that there is at present a substantial movement of cotton, in carloads, from Memphis,

Tennessee, to points in the destination territory heretofore described via the lines of the Missouri Pacific Railroad Company, St.
116 Louis Southwestern Railway Company and St. Louis-San Francisco Railway Company from Memphis, Tennessee, through St. Louis, Missouri, which said movement will be materially reduced if the barge-rail rate ordered by the said Commission becomes effective by reason of the fact that the barge-rail rate ordered to be established from Memphis, Tennessee, to the destination territory here involved is substantially lower than the all-rail rate, carloads, on cotton from Memphis, Tennesee, to such destination territory.

As to rail-barge-rail rates on cotton, in carloads, required to be established as aforesaid by the Commisison, cotton moving by such routes will move by rail from points in Arkansas to Memphis, Tennessee, by barge to Pittsburgh, Pennsylvania, and thence by rail to the destination territory heretofore described, and from many points of origin on their lines in Arkansas the Missouri Pacific Company, St. Louis Southwestern Railway Company, and St. Louis-San Francisco Railway Company will be deprived of the full use of their lines of railroad in connection with the transportation of such cotton by reason of the fact that all of such cotton that moves rail-barge-rail will move to Memphis, Tennessee, a shorter distance than through St. Louis, Missouri, and in consequence of being short-hauled (as just described, such carriers by railroad will be deprived of substantial revenue, and affiant states that there is a substantial movement of cotton, in carloads, via all-rail routes in which the Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, receivers), and St. Louis Southwestern Railway Company now participate from points on
117 their lines in Arkansas to the destination territory heretofore mentioned.

Further, affiant states that the Kansas City Southern Railway Company, which now participates in the transportation of cotton, in carloads, via all-rail routes between points in Arkansas and the destination territory heretofore described, will sustain losses in revenue, because it will, if the rail-barge-rail rates described as aforesaid become effective, be required to surrender cotton at junction points in Arkansas for transportation to Memphis that will result in the Kansas City Southern Railway Company earning less revenue than it would earn if such cotton moved all-rail routes from points in Arkansas to the destination territory involved, and that the situation of the Chicago, Rock Island and Pacific Railway Company is substantially similar to the situation of the Kansas City Southern Railway Company and just described.

Further affiant states that the St. Louis Southwestern Railway Company, Missouri Pacific Railroad Company, the Chicago, Rock Island and Pacific Railway Company, St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, receivers), and

the Kansas City Southern Railway Company are common carriers by railroad and subject to the Interstate Commerce Act. That the orders made by the Commission in said Docket Ex Parte No. 102 on the applications of American Barge Line Company were made and entered by the Commission without affording carriers by railroad required to participate in the rail-barge-rail and barge-rail rates required to be established, a hearing, and such rail-barge-rail
118 and barge-rail rates as before described were ordered to be established by the Commission without testimony and require lower rates via rail-barge-rail routes and barge-rail routes on cotton, in carloads, than in effect via all-rail routes from points in Arkansas and from Memphis, Tennessee, to the destination territory heretofore described, which will divert a large amount of cotton from all-rail to rail-barge-rail and barge-rail routes. That the cotton, in carloads, that will move under such rail-barge-rail and barge-rail rates originates at points in the State of Arkansas on the lines of Missouri Pacific Railroad Company, St. Louis Southwestern Railway Company, the Chicago, Rock Island and Pacific Railway Company, St. Louis-San Francisco Railway Company, the Kansas City Southern Railway Company, and other lines of railroad whose rails are located in the State of Arkansas.

Affiant also states that the carriers by railroad specifically named in the next above and foregoing paragraph during the year 1932 did not earn and now are not earning revenue sufficient to meet their interest requirements; that is, are not earning enough revenue to pay their fixed charges, and if the rail-barge-rail rates and barge-rail rates hereinbefore described are made effective, such carriers by railroad will be deprived of additional revenue much needed by such carriers; and also, that the rail-barge-rail and barge-rail rates required to be established as aforesaid are unreasonably low, are lower than the carload all-rail rates now in effect, which said rates last named are much depressed, and the carriers by railroad required by the orders of the Commission aforesaid to participate in said
119 rail-barge-rail rates will be forced to participate, if such orders are made effective, in rates unreasonably low and be deprived of earnings that would otherwise accrue to such carriers, if they were not required to participate in such rail-barge-rail rates.

(Signed) J. R. STALEY.

[*Duly sworn to by J. R. Staley, jurat omitted in printing.*]

120 In United States District Court

Affidavit of O. M. Meyne

Filed Feb. 23, 1933

STATE OF OHIO,

County of Cuyahoga, ss:

O. M. Meyne, being first duly sworn, deposes and says that he is general freight agent of Erie Railroad Company with headquarters at Cleveland, Ohio;

That he has made an investigation of the accounting and traffic department records of Erie Railroad Company for the purpose of determining (1) the volume of movement of baled cotton, carloads, from origin points in Arkansas and from Memphis, Tenn., handled via the lines of Erie Railroad subsequent to September 1, 1932, and the gross revenue derived therefrom, and (2) what effect the decision of the Interstate Commerce Commission dated December 10, 1932, in ex parte 102, Application of American Barge Line Company, 190 I.C.C. 7, if permitted to become effective, would have upon such traffic and revenue of Erie Railroad Company;

That during the months of September, October, November, and December 1932 and January 1933 Erie Railroad Company received from its connections, principally at Buffalo, N.Y., a total of 49 cars of baled cotton originating at points in Arkansas and/or Memphis, Tenn., and transported said cars over its line to Binghamton, N.Y., and there delivered said cars to its connection for movement beyond to various points in the New England States;

That for the aforesaid transportation services Erie Railroad Company received on the average approximately $27.00 gross revenue per car, and that on the basis of a full year's business, calculated at the rate of 9.9 cars per month, 119 cars at $27.00 each would result in gross Erie revenue of $3,213.00;

That if rates are established on cotton via the American Barge Line at a differential under the present all-rail rates the cotton traffic from Arkansas origins and Memphis, Tenn., would undoubtedly be diverted from the all-rail routes and would move via the American Barge Line to Pittsburgh, Pa., and Erie Railroad Company would not, under ordinary circumstances, participate in the transportation movement, especially on traffic destined to New England points, and it would be deprived of above-mentioned revenue it now enjoys on this traffic.

121

(Signed) O. M. MEYNE.

Subscribed and sworn to before me this 20th day of February, 1933.

[SEAL]

(Signed) VANSTAN LEE,
Notary Public.

[File endorsement omitted.]

122

In United States District Court

[Title omitted.]

Affidavit of J. P. Patterson

Filed Feb. 23, 1933

STATE OF ILLINOIS,
County of Cook, ss:

Affiant, J. P. Patterson, being first duly sworn, states on oath that he is assistant freight traffic manager of the New York Central Rail-

[illegible] company, and has been a traffic officer of such company for ten years last past; that he is familiar with the location of the lines of railroad of The New York Central Railroad Company and its leased lines over which cotton moves from Memphis, Tennessee, to destinations in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

Affiant further states that The New York Central Railroad Company and its leased lines operate lines of railroad extending from Cairo and St. Louis, Illinois, Evansville, Indiana, Louisville, Kentucky, and Cincinnati, Ohio, to certain eastern destinations; that the lines of The New York Central Railroad Company and its leased lines connect at the above-mentioned points with the lines of other carriers, plaintiffs in this proceeding; that joint through rates on cotton are now in effect from Memphis, Tennessee, applying by the lines of plaintiffs to Indianapolis, Indiana, and thence by eastern all-rail connections to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut; that cotton has been and is moving today from Memphis, Tennessee,
123 by this all-rail route through Indianapolis, Indiana, to these destinations on the said joint-through rates that apply over the said route.

Affiant further states that in his capacity as said assistant freight traffic manager he has charge of the establishment, maintenance, and revision of the freight rates on cotton applying from Cairo and St. Louis, Illinois, Indianapolis, Indiana, Louisville, Kentucky, and Cincinnati, Ohio, to destinations in the said States of Pennsylvania, New Jersey, Massachusetts, Rhode Island, and Connecticut; that he is familiar with those rates and with the quantity of cotton that has moved under those rates during the last few years and is moving today under those rates; that he is also familiar with the effect upon the quantity of cotton that moves by the all-rail routes hereinbefore described from Memphis, Tennessee, and from points in Arkansas to destinations in the said States, of rates applying by barge-rail and rail-barge-rail routes that are less than the rates applying by the all-rail routes hereinbefore described; that it has been his experience that the establishment of rates by barge-rail and rail-barge-rail routes from cotton-shipping points of origin in the States of Mississippi, Tennessee, and Arkansas, that are less than the rates applying by the all-rail routes from the said points of origin, has inevitably resulted in the diversion of a very substantial quantity of cotton traffic from the all-rail routes to the barge-rail and rail-barge-rail routes over which cheaper rates apply.

Affiant further states that cotton shipped to destinations in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, from either Memphis, Tennessee, or from points in Arkansas by the barge-rail and rail-barge-rail routes respectively prescribed by the Interstate Commerce Commission in its said

order of December 10, 1932, in Ex Parte No. 102, Application of American Barge Line Company, would move from Memphis, Tennessee, by the water route of the American Barge Line Company extending on the Mississippi and Ohio Rivers from Memphis, Tennessee, to Pittsburgh, Pennsylvania, and that when cotton moves by such barge-rail and rail-barge-rail routes, affiant states that a certain proportion or all of the cotton which moves via the New York Central Railroad Company and its leased lines should be received by it at Pittsburgh, Pennsylvania, or Buffalo, New York, thus short hauling The New York Central Railroad Company and its leased lines to a very considerable extent.

Affiant further states that if the barge-rail and rail-barge-rail rates take effect in accordance with the said order of the Interstate Commerce Commission of December 10, 1932, in Ex Parte No. 102, Application of American Barge Line Company, such cotton as moves under the said rates will be irretrievably lost to the all-rail routes, and that even though the Interstate Commerce Commission should in a later proceeding find that the differentials that it has prescribed in its said order of December 10, 1932, were too great and should be reduced, the New York Central Railroad Company and its leased lines would have no means of recovering back any portion of the revenue that it would have received from cotton that would have moved by its all-rail routes had the differentials been fixed by the Interstate Commerce Commission at amounts that are less than the differentials fixed by the Interstate Commerce Commission in its said order of December 10, 1932.

Affiant further states that to his own knowledge, other important carriers by railroad, parties to this bill of complaint, participate in joint through all-rail rates on cotton from the origin territory to the destination territory hereinbefore described, and under such

125 rates do now handle a part of the cotton traffic moving from and to said territories, and that if the rail-barge-rail and barge-rail rates on cotton heretofore referred to become effective, a substantial part of the cotton traffic now handled by plaintiffs herein will be diverted from all-rail routes in which plaintiffs participate to rail and water routes in which said plaintiffs cannot participate although your affiant is unable to approximate with any accuracy the exact amount of such diversion.

(Signed) J. P. PATTERSON.

Subscribed and sworn to before me in the County of Cook, State of Illinois, this 21st day of February, A.D. 1933.

[SEAL] (Signed) LEO P. DAY,
Notary Public.

[File endorsement omitted.]

[Title omitted.]

Affidavit of S. C. Matthews

Filed Feb. 23, 1933

STATE OF ILLINOIS,
County of Cook, ss:

Affiant, S. C. Matthews, being first duly sworn, states on oath that he is assistant freight traffic manager of the Pennsylvania Railroad Company and has been connected with the traffic department of the Pennsylvania Railroad Company and its affiliated lines for over twenty-five years last past; that he is familiar with the location of the lines of railroad of the Pennsylvania Railroad Company and the route of the Pennsylvania Railroad Company over which cotton moves when delivered by the Illinois Central at Indianapolis, Indiana, to the Pennsylvania Railroad, destined to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

Affiant further states that the Pennsylvania Railroad Company operates a line of railroad extending from Indianapolis to New York City and other eastern points; that the line of the Pennsylvania Railroad connects at junctions in the vicinity of New York City with the lines of other carriers, plaintiffs in this proceeding; and that joint through rates on cotton of 69 cents per 100 pounds are now in effect from Memphis, Tennessee, applying via the line of the Illinois Central Railroad Company to Indianapolis, Indiana, and thence by the Pennsylvania Railroad Company to points in Pennsylvania, New York, and New Jersey, and its connecting eastern carriers to Massachusetts, Rhode Island and Connecticut;

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that cotton has been and is moving today from Memphis, Tennessee, by this all-rail route from Indianapolis, Indiana, to these destinations on the said joint through rates that apply over the said route.

Affiant further states that there is also delivered to the Pennsylvania at Indianapolis, Indiana, cotton that moves from points in Arkansas to Memphis, Tennessee, and delivered to the Pennsylvania Railroad Company at Indianapolis, Indiana, by the Illinois Central Railroad Company and moving to destinations in the States of Pennsylvania, New York, New Jersey, Rhode Island, Massachusetts, and Connecticut.

Affiant further states that in the division of the all-rail rate from Memphis, Tennessee, to Boston, Massachusetts, Boston, being selected as a representative destination, the rail lines east of Indianapolis receive a proportion of 40.9 cents per cwt.; that under the second supplemental report of the Commission in Ex Parte 102, dated December 10, 1932, the barge-rail rate from Memphis to points in

Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut becomes a specific differential of 6 cents under the all-rail rates, instead of the differential figured on basis of 20 per-cent of the port-to-port rate deducted from the all-rail rate, which makes the barge-rail rate via Pittsburgh 63 cents per 100 pounds; that there is no fixed basis prescribed for dividing the new barge-rail rates to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut; but if the basis known as the "Commission's Ex Parte 99 formula" is applied to the new rates, the rail portion east of Pittsburgh will become 32.8 cents per 100 pounds, and the difference between the rail proportion east of Pittsburgh out of the proposed barge-rail rate and the rail proportion east of Indianapolis out of the all-rail rate will be 8.1 cents per cwt.

Affiant further states that if the barge-rail and rail rates take effect in accordance with the said order of the Interstate Commerce Commission of December 10, 1932, in Ex Parte 102, such cotton as moves under the said rates will be irretrievably lost to the all-rail routes;

128 and even though the Interstate Commerce Commission should in a later proceeding find that the differentials that it had prescribed in said order of December 10, 1932, were too great and should be reduced, the Pennsylvania Railroad Company would have no means of recovering back any portion of the revenue that it should have received from cotton moving from Memphis, Tennessee, or points in Arkansas, that would have moved by the all-rail route.

Further affiant sayeth not.

(Signed) S. C. MATTHEWS.

Subscribed and sworn to before me this 21st day of February, A.D. 1933.

[SEAL] (Signed) MICHAEL J. HABERKORN,
Notary Public.

[File endorsement omitted.]

129 In United States District Court

[Title omitted.]

Affidavit of Robert D. Reeves

Filed Feb. 23, 1933

STATE OF TENNESSEE,
County of Shelby, ss:

Affiant, Robert D. Reeves, being first duly sworn, states on oath that he is assistant traffic manager of the Illinois Central Railroad Company, and has been engaged in rate and traffic work and an officer of different companies and of such company for over 30 years last past; that he is familiar with the location of the lines of railroad of the Illinois Central Railroad Company and the routes of the Illinois Central Railroad Company over which cotton moves from

Memphis, Tennessee, to destinations in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

Affiant further states that the Illinois Central Railroad Company operates a line of railroad extending from Memphis, Tennessee, through Cairo, Illinois, to Indianapolis, Indiana; that the line of the Illinois Central Railroad Company connects at Indianapolis, Indiana, with the lines of other carriers, plaintiffs in this proceeding; that joint through rates on cotton are now in effect from
130 Memphis, Tennessee, applying by the line of the Illinois Central Railroad Company to Indianapolis, Indiana, and thence by its eastern all-rail connections to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut; that cotton has been and is moving today from Memphis, Tennessee, by this all-rail route through Indianapolis, Indiana, to these destinations on the said joint through rates that apply over the said route.

Affiant further states that at Memphis, Tennessee, the railroad of the Illinois Central Railroad Company connects with the railroads of carriers whose rails extend from points in Arkansas to Memphis, Tennessee, such as the Missouri Pacific Railroad Company, the St. Louis Southwestern Railway Company, the Chicago, Rock Island and Pacific Railway Company, and the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, receivers); that there are through joint all-rail rates on cotton applying from points of origin in Arkansas on some of the lines of these carriers whose rails extend from these points of origin in Arkansas to Memphis, Tennessee, thence by the said route of the Illinois Central Railroad Company through Indianapolis, Indiana, to destinations in the said States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut; that cotton has been and is moving today from these points in Arkansas by way of Memphis, Tennessee, and thence by the route of the Illinois Central Railroad Company through Indianapolis, Indiana, to destinations in the said States on the joint through rates that apply over such routes.

Affiant further states that in his capacity as said assistant traffic manager, he has charge of the establishment, maintenance, and revision of the freight rates on cotton applying from Memphis, Tennessee, and from points of origin in Arkansas by the all-rail routes hereinbefore described, to destinations in the said States of
131 Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut; that he is familiar with those rates and with the quantity of cotton that has moved under those rates during the last few years and is moving today under those rates; that he is also familiar with the effect upon the quantity of cotton that moves by the all-rail routes hereinbefore described from Memphis, Tennessee, and from points in Arkansas to destinations in the said States, of rates applying by barge-rail and rail-barge-rail routes that are less than the rates applying by the all-rail routes hereinbefore described from Memphis, Tennessee, and points in Arkansas;

that it has been his experience that the establishment of rates by barge-rail and rail-barge-rail routes from cotton-shipping points of origin in the States of Mississippi, Tennessee, and Arkansas, that are less than the rates applying by the all-rail routes from the said points of origin, has inevitably resulted in the diversion of a very substantial quantity of cotton traffic from the all-rail routes to the barge-rail and rail-barge-rail routes over which cheaper rates apply.

Affiant further states that cotton shipped to destinations in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut from either Memphis, Tennessee, or from points in Arkansas by the barge-rail and rail-barge-rail routes respectively prescribed by the Interstate Commerce Commission in its said order of December 10, 1932, in Ex Parte No. 102, Application of American Barge Line Company, would move from Memphis, Tennessee, by the water route of the American Barge Line Company extending on the Mississippi and Ohio Rivers from Memphis, Tennessee, to Pittsburgh, Pennsylvania, and that when cotton moved by such barge-rail and rail-barge-rail routes, the Illinois Central Railroad Company
132 would not participate in any part of such movement.

Affiant further states that based upon his contact with the cotton trade, his experience in traffic matters in the cotton-producing territory in Arkansas, Tennessee, Mississippi, and Kentucky, his knowledge of the quantity of cotton produced in Arkansas and in the territory in Tennessee, Mississippi, and Kentucky that is tributary to Memphis, Tennessee, and that would move under the rates that are now in effect and apply over the all-rail routes hereinbefore described, which are made up of some portion of the lines of the Illinois Central Railroad Co., in his opinion the annual movement of cotton that would move by the all-rail routes hereinbefore described from Memphis, Tenn., and from points of origin in Arkansas to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut will amount to approximately 53,000 bales; that if the barge-rail and rail-barge-rail rates prescribed by the Interstate Commerce Commission in its said order of December 10, 1932, in Ex Parte No. 102, Application of American Barge Line Company, which are less than the corresponding all-rail rates applying over the all-rail routes hereinbefore described by the amounts prescribed by the Interstate Commerce Commisison in its said order, become effective, the Illinois Central Railroad Company will suffer a diversion to rail-water routes of approximately half its annual movement of cotton from the origin to the destination territory involved, with a resulting loss to it of approximately $40,000.00, based upon the established divisions of through all-rail rates now in effect between it and its connections by the all-rail routes hereinbefore described.

Affiant further states that if the barge-rail and rail-barge-
133 rail rates take effect in accordance with the said order of the Interstate Commerce Commisison of December 10, 1932, in

such cotton as moves under the said rates will be irretrievably lost to the all-rail routes, and that even though the Interstate Commerce Commisison should in a later proceeding find that the differentials that it has prescribed in its said order of December 10, 1932, were too great and should be reduced, the Illinois Central Railroad Company would have no means of recovering back any portion of the revenue that it would have received from cotton from Memphis, Tennessee, or points in Arkansas that would have moved by its all-rail routes had the differentials been fixed by the Interstate Commerce Commission at amounts that are less than the differentials fixed by the Interstate Commerce Commission in its said order of December 10, 1932.

Affiant further states that to his own knowledge other important carriers by railroad, such as the Louisville & Nashville Railroad Company and Southern Railway Company, participate in joint-through all-rail rates on cotton from the origin territory to the destination territory hereinbefore described, and under such rates do now handle a part of the cotton traffic moving from and to said territories, and that if the rail-barge-rail and barge-rail rates on cotton heretofore referred to become effective, a substantial part of the cotton traffic now handled by the Louisville & Nashville and Southern Railway Companies will be diverted from all-rail routes in which they participate to rail and water routes in which said companies cannot participate, although your affiant is unable to approximate with any accuracy the exact amount of such diversion.

(Signed) ROBERT D. REEVES.

Subscribed and sworn to before me in the county and State aforesaid, this 18th day of February, A.D. 1933.

[NOTARIAL SEAL.] (Signed) F. J. THEOBALD,
Notary Public.

134 [File endorsement omitted.]

135 In United States District Court

[Title omitted.]

Affidavit of George A. Casey

Filed Feb. 27, 1933

CITY OF WASHINGTON,
District of Columbia, ss:

George A. Casey, being first duly sworn, deposes and says that he is assistant to the director of the Bureau of Statistics of the Interstate Commerce Commission; that said Bureau has in charge the various reports of movements of commodities of common carriers

by railroad subject to the Interstate Commerce Act, made under regulations of the Interstate Commerce Commission issued pursuant to authority contained in said Interstate Commerce Act; that pursuant to his instructions and under his direction and supervision, there were compiled data with respect to the movement of cotton during the calendar years 1930, 1931, and the first three quarters of the year 1932, over the lines of the Illinois Central Railroad Company, the Southern Railway Company, the Louisville & Nashville Railroad Company, and the Yazoo and Mississippi Valley Railroad Company; that these figures and data were taken and compiled from reports made by each of said companies for the respective periods; that the following table sets forth the result of such compilation and shows the extent and amount of all cotton handled by said companies for the specific periods, to wit:

Cotton in bales

CARLOADS ORIGINATED

Period ended	Illinois Central R.R. Co.	Yazoo & Mississippi Valley R.R.	Southern Railway Company	Louisville & Nashville R.R. Co.
1930				
First quarter	3,694	4,256	4,369	1,191
Second quarter	2,235	1,441	3,610	605
Third quarter	1,747	2,656	2,155	733
Fourth quarter	6,484	10,428	6,058	3,762
1931				
First quarter	5,443	(1)	2,473	985
Second quarter	2,966	(1)	2,590	558
Third quarter	2,337	(1)	1,976	316
Fourth quarter	13,624	(1)	3,861	1,451
1932				
First quarter	6,842	(1)	2,090	620
Second quarter	2,775	(1)	892	298
Third quarter	4,994	(1)	1,814	427

TONS ORIGINATED

1930				
First quarter	42,535	44,450	45,868	12,599
Second quarter	29,768	16,285	40,818	7,147
Third quarter	20,010	23,623	19,382	5,894
Fourth quarter	64,588	97,416	53,598	32,213
1931				
First quarter	59,311	(1)	27,803	9,452
Second quarter	33,077	(1)	28,581	5,637
Third quarter	24,083	(1)	21,022	2,927
Fourth quarter	131,513	(1)	39,368	14,782
1932				
First quarter	70,998	(1)	23,402	8,623
Second quarter	32,577	(1)	12,007	4,277
Third quarter	56,631	(1)	20,383	4,951

[1] Current reports of Illinois Central R.R. include Yazoo & Mississippi Valley Railroad.

137 Deponent further says that the reports of the above-named carriers do not show to what extent or for what distance over their respective lines the movements of cotton took place, nor do

said reports show the origin or destination points of the said shipments; but deponent avers that the said figures and data herein set forth do show and cover the entire amount of cotton in bales carried over the lines of the said carriers irrespective of the length of the haul, whether handled as a shipment entirely local to the line of the respective railroad or as a part of a transportation movement in connection with other lines of railroad.

(Sgd.) GEORGE A. CASEY.

Subscribed and sworn to before the undersigned, a notary public, within and for the District of Columbia, this 25th day of February, 1933.

[SEAL.]

(Sgd.) WM. B. WILBUR,
Notary Public.

Commission expires 1/11/34.

[File endorsement omitted.]

138 In United States District Court

[Title omitted.]

Affidavit of T. Q. Ashburn

Filed Feb. 27, 1933

T. Q. Ashburn, being duly sworn upon his oath, states that he is a major general of the Regular Army of the United States and also occupies the position of chairman of the board and president of the Inland Waterways Corporation, an intervenor in the above-entitled and numbered cause. He has been connected with said corporation in substantially the capacity above mentioned for the past eight and one half years, during all of which period he has been familiar with the affairs of the Federal Barge Lines, the name given the operating unit owned by the Inland Waterways Corporation, which is engaged in the business of common carriage of freight in interstate commerce on the Mississippi River, on the Illinois River, and on the Warrior River channel.

Affiant states that during all of said period the said barge line has, at its various ports of call on said channels, interchanged freight moving via rail and water common carriers in joint through routes between points of origin and points of destination, and that

139 he is familiar with the controversies and difficulties incident to securing joint arrangements between water and rail carriers for such service which prevailed prior to the adoption on May 29, 1928, of the provision contained in section 3 (e) of the Inland Waterways Corporation Act as amended, and is familiar with all of the proceedings of the Interstate Commerce Commission under said section 3 (e) since its adoption.

Affiant states that prior to the adoption of said section 3 (e) it was impossible for any barge line engaged in common carriage of freight to secure from any but friendly railroads joint arrangement for the movement of freight in interstate commerce via rail and water without first indulging in a proceeding before the Interstate Commerce Commission under appropriate provisions of the Interstate Commerce Act prolonged by the efforts of hostile rail carriers. That since the adoption of said section 3 (e) the Inland Waterways Corporation secured from the Interstate Commerce Commission, in compliance with said section, a certificate of public necessity and convenience as an incident to which the said Commission prescribed certain rules and regulations to govern in the ascertainment of appropriate routes and rates on traffic seeking to move partly by rail and partly by water from origin to destination, all as shown in the attached copy of the order of the said Commission decided April 8, 1929, in a cause which the Commission has entitled "Ex Parte No. 96, Through Routes and Joint Rates Between Inland Waterways Corporation and Other Common Carriers", a copy of which is attached hereto and marked "Exhibit A" as a part of this affidavit, and that, later, the said Commission in the same docket by an order decided May 15, 1930, amended its said previous order as is shown in a copy of said later order attached hereto and marked "Exhibit B" as a part of this affidavit.

140 That immediately after the promulgation of the earlier order of the Commission above referred to, the Inland Waterways Corporation employed a large number of tariff experts and their necessary clerks and assistants, and the rail lines furnished a number of tariff clerks and assistants, and the two groups have been, since then, engaged in checking in joint routes and rates in compliance with the formulas laid down in said orders of said Commission. That this work has entailed great expense to both the Inland Waterways Corporation on the one hand and the interested rail carriers on the other. That as a result of this work a joint rail and water tariff system is gradually being constructed in accordance with the orders of said Commission and that for a long time past and at the present time a large amount of the freight handled by the barge line of the Inland Waterways Corporation moves via the routes and under the differentially constructed rates arrived at and published in accordance with the said orders of said Commission.

This affiant further states that transportation via barge line is necessarily and inherently slower and less desirable to shippers than is transportation by rail, and that in order to attract any business the barge line must be able to quote rates that are considerably lower than those quoted by the rail carriers.

Affiant further states that he is familiar with the costs of transportation of freight by barge and with the cost of transportation of freight by rail and that the cost of transportation of freight by barge is cheaper than is the cost of transportation of freight by rail except in particular instances which, because of difficulties or re-

quirements or general conditions surrounding particular movements of freight, do not present economy in movement by water.

141 That during affiant's connection with the Inland Waterways Corporation a large amount of cotton has moved via the barge line of said Corporation and affiant has become familiar by long experience with the characteristics of the movement of cotton as freight in the United States. That such movement is seasonal in the extreme and begins, ordinarily, in volume during the month of September in each year and gradually increases in volume until about the month of January, when the volume of movement gradually decreases until about the month of May, at which time the movement ceases except for infrequent shipments of small lots which continue intermittently throughout the balance of the year.

Affiant further states that if the rail lines are permitted to lower their rates on cotton and other important commodities suitable for transportation via barge upon the claim that this is necessary in order to protect the rails from competition by truck and water carrier and barge lines are, at the same time, denied the right to quote rates differentially lower than the rail rates all traffic will leave the barge lines and the latter will be thus forced to go out of business.

T. Q. ASHBURN.

[*Duly sworn to by jurat omitted in printing.*]

142 *Exhibit "A" to affidavit of T. Q. Ashburn.*

15693. Interstate Commerce Commission. Ex Parte No. 96. Through Routes and Joint Rates Between Inland Waterways Corporation and Other Common Carriers

143

EX PARTE NO. 96 [1]

Through Routes and Joint Rates Between Inland Waterways Corporation and Other Common Carriers

Decided May 15, 1930

1. Upon reconsideration, original findings modified to provide (a) that no barge-rail rate or rail-barge-rail rate established thereunder shall be lower than the all-rail rate between the inland point of origin or destination and the port of interchange with the barge line and (b) that barge-rail rates between Mobile, Ala., and points in southern territory shall be no higher than the corresponding barge-rail rates between New Orleans, La., and the same points. Former order amended. Prior reports, 153 I.C.C. 129, 156 I.C.C. 141, and 161 I.C.C. 207.
2. Proposed barge-rail rates between New Orleans, La., and Mobile, Ala., on the one hand, and points in southern territory on the

[1] This report also embraces Investigation and Suspension Docket No. 3337, Sugar and Class Rates Between Points in the South via Barge and Rail Routes.

other hand, found justified, except rates which result in departures from the long-and-short-haul provision at Mobile. Rates found not justified required to be canceled without prejudice to publication of new rates in accordance with findings herein. Proceeding discontinued.

Luther M. Walter, John S. Burchmore, Nuel D. Belnap, W. M. Hough, and H. L. Walker for respondents in Investigation and Suspension Docket No. 3337.

R. G. Cobb for protestant.

Carl Giessow for New Orleans, La., Joint Traffic Bureau.

Third Supplemental Report of the Commisison on Reconsideration

Division 4, Commissioners Meyer, Eastman, and Woodlock

Eastman, Commissioner:

In our original report in the title proceeding, 153 I.C.C. 129, we granted a certificate of public convenience and necessity to the Inland Waterways Corporation under section 3 of the Inland Waterways Corporation Act, as amended by the Denison Act, and ordered the establishment of through barge-rail and rail-barge-rail routes and joint rates on classes and commodities over the Federal barge line and connecting railroads, subject to a proviso that no barge-rail route need be established where the short-line all-rail distance via
144 the lines of the rail carriers from point of origin to point of destination through the port of interchange with the barge line exceeds by more than 40 percent the shortest all-rail distance between such points of origin and destination, nor where the shortest all-rail distance between the inland point of origin or destination and the port of interchange exceeds three fourths of the shortest all-rail distance between point of origin and point of destination. Where the short-line all-rail distance from point of origin to point of destination via the port of interchange with the barge line does not exceed the shortest all-rail distance by more than 20 percent, and where the shortest all-rail distance between the inland point of origin or destination and the port of interchange with the barge line is not more than two-thirds of the shortest all-rail distance, we prescribed rates determined by deducting from the all-rail rate between the points of origin and destination a differential of 20 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by the barge line. In all other cases the barge-rail rates prescribed were to be determined by deduction of a differential of 10 percent of the lowest corresponding all-rail rate between the ports.

In accordance with the order above prescribed, respondents filed schedules intended to become effective August 27, 1929, proposing revised class and commodity rates between New Orleans, La., Mobile, Ala., and other ports served by the Federal barge line, on the one

hand, and points in southern territory on the other hand, over barge-rail routes. Upon protest of the Mobile chamber of commerce the operation of the schedules was suspended until March 27, 1930, in Investigation and Suspension Docket No. 3337, and subsequently postponed voluntarily until June 26, 1930.

By agreement of the interested parties the order of suspension was vacated as to a large number of the rates originally included, leaving for consideration here only rates on classes and a number of commodities, including sugar, between New Orleans and Mobile, on the one hand, and points in Florida, Georgia, South Carolina, North Carolina, and Virginia east of a line connecting Atlanta, Macon, and Augusta, Ga., Columbia, S.C., and Marion, N.C. Rates are stated in cents per 100 pounds.

The rates under suspension appear to have been published in strict accordance with our order in ex parte No. 96. They include rates to and from New Orleans via Mobile, Holt, and Birmingport, Ala., as ports of interchange, and rates to and from Mobile via Holt and Birmingport. Because of differences in the all-rail distances from Mobile and New Orleans to the territory involved in this case, and differences in the ratios of port-to-port distances to shortest
145 all-rail distances, it happens that the rates to and from New Orleans are based on a differential of 10 percent or 20 percent of the all-rail port-to-port rate, whereas either no joint barge-rail rates are required between Mobile and the same points or the differential is 10 percent. The result is that in many instances the barge-rail rates to and from New Orleans are lower than barge-rail rates and in some instances lower than the all-rail rates to and from Mobile. This is illustrated by the following rates on sugar, in carloads, to Abbeville, Ga.:

	Cents
From New Orleans, all rail	44
From New Orleans, barge-rail	37
From Mobile, all rail	38
From Mobile, barge-rail (combination)	49

The distances are as follows:

	Via Birmingport	Short-line
	Miles	*Miles*
New Orleans	630	517
Mobile	534	378

All parties agree that such departures from the long-and-short-haul provision should be corrected, but they differ as to the method of correction. The barge line agrees with the respondent rail carriers that barge-rail rates to and from New Orleans via Mobile should be increased where necessary so as to be no lower than the all-rail rates to and from Mobile. As to rates via Holt and Birmingport the barge line and the rail carriers are also in agreement

that the rates to and from Mobile should not exceed those to and from New Orleans but the barge line urges that a parity be brought about by establishing to and from Mobile rates which would be no higher than those produced by the formula above described to and from New Orleans, whereas the rail carriers urge that the latter rates should be increased to an equality with the present Mobile rates. We are of the view that the course urged by the rail carriers would do too great violence to the findings in ex parte No. 96 and would be unwarranted.

The Mobile protestant believes that none of the courses proposed by respondents would avoid undue prejudice to Mobile and preference of New Orleans and that the revision of the suspended rates should do more than merely eliminate fourth-section departures. It states on brief:

"The protestant believe a fair solution of this matter would be the establishment of rates from and to New Orleans under the formulas prescribed in Ex parte 96 with rates from and to Mobile
146 that were fairly related to New Orleans, that is, if the formula fixed a 20% differential rate between New Orleans and a given point, the 20% differential basis should be used between Mobile and that point. If the formula fixed a 10% differential rate between New Orleans and a given point, the 10% differential basis should be used between Mobile and that point."

We deem the present record insufficient to justify our requiring a basis of rates to and from Mobile such as protestant seeks. Section 3 (e) of the Inland Waterways Corporation Act after authorizing hearings concerning the lawfulness of routes, rates, differentials, and divisions prescribed under the summary procedure provided for in the first instance by the same section states:

"At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint."

Although complaints on behalf of shippers are not mentioned, the language above quoted in spirit seems to support the view that the burden of proof would likewise be upon such complainants who allege undue prejudice and preference, just as it is in the case of any complaint setting forth an alleged violation of section 3 of the Interstate Commerce Act. Protestant clearly has not sustained that burden here. Its evidence is very brief, consisting for the most part of comparisons of present and suspended rates from New Orleans with those from Mobile. No distances are shown, nor is there any other evidence to indicate whether or not barge-rail routes to and from Mobile are as economical as those to and from New Orleans. Generally speaking, it appears that the barge movement to and from Mobile is in lower ratio to the total barge-rail service than is the case with respect to New Orleans, and that the barge-rail

routes to and from Mobile represent a greater percentage of circuity than the New Orleans routes. The formula prescribed in Ex parte 96 was designed to reflect both these elements, and we see no reason from the facts now before us to modify it in the manner urged by protestant.

We find that the suspended schedules have been justified except insofar as they include rates which result in departures from the long-and-short-haul provision. The latter rates, we find, have not been justified, and we shall require their cancellation without prejudice to the filing on not less than five days' notice of schedules publishing (a) rates over barge-rail routes to and from New Orleans via Mobile which shall not be lower than all-rail rates to and from Mobile and (b) rates over barge-rail routes to and from Mobile via Holt and Birmingport which shall not exceed rates over
147 barge-rail routes to and from New Orleans via Holt and Birmingport resulting from the findings in Ex Parte No. 96.

An appropriate order will be entered in the suspension proceeding, and the order in Ex Parte No. 96 will be modified so as to permit publication of the rates herein approved in accordance with a stipulation of the parties filed in the instant proceeding agreeing to such modification. Several petitions have been received from railroad respondents in Ex Parte No. 96, calling attention to situations where barge-rail and rail-barge-rail rates to and from certain points of origin and destination resulting from the order in this proceeding are lower than all-rail rates between points of interchange with the barge line and the same points of origin and destination, and asking that the all-rail rates in such instances be observed as minima over barge-rail and rail-barge-rail routes. The modification of the order in ex parte No. 96 here made will cover such situations.

148

Orders

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D.C., on the 15th day of May, A.D. 1930

Ex Parte No. 96. Through Routes and Joint Rates Between Inland Waterways Corporation and Other Common Carriers

Said division, having on the date hereof, made and filed its third supplemental report on reconsideration in the above-entitled proceeding, containing its further findings and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the second ordering paragraph of the order of April 8, 1929, herein, as subsequently amended, be, and it is hereby, further amended by adding at the end of said paragraph the following:

Provided further, That no joint barge-rail or rail-barge-rail rate established under this order to or from any given point of origin or

destination shall be lower than the corresponding all-rail rate between such point of origin or destination and the port of interchange; and provided further, that barge-rail rates between Mobile, Ala., and points in southern territory via Holt and Birmingport, Ala., shall in no case exceed the corresponding barge-rail rates herein prescribed between New Orleans, La., and the same points.

Investigation and Suspension Docket No. 3337. Sugar and Class Rates Between Points in the South via Barge and Rail Routes

It appearing, That by order dated August 26, 1929, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said order, and suspended the operation of said schedules until March 27, 1930, and that said schedules have been voluntarily suspended until June 26, 1930;

It further appearing, That a full investigation of the matters and things involved has been had, and that said division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred
149 to and made a part hereof, and has found with certain exceptions that respondents have justified the schedules under suspension:

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel the said schedules, insofar as they propose joint rates in connection with the Inland Waterways Corporation, barge line, that will result in departures from the long-and-short-haul provisions of section 4 of the Interstate Commerce Act, at Mobile, Ala., on or before June 25, 1930, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That the order heretofore entered in this proceeding, suspending the operation of said schedules, designated therein, except as to the schedules mentioned in the next preceding paragraph hereof, be, and it is hereby, vacated and set aside as of June 25, 1930, and this proceeding be discontinued.

By the Commission, division 4.

[SEAL]

GEORGE B. McGINTY,
Secretary.

150 [File endorsement omitted.]

151 *Plaintiff's Exhibit "A"*

Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of petition of the American Barge Line Company for the establishment of through rail-barge-rail rates on cotton in carload lots from all points in the State of Arkansas to all points in the States of Pennsyl-

vania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, filed November 2, 1932, in Ex Parte No. 102. Application of American Barge Line Company, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 12th day of January, A.D. 1933.

[SEAL.] (Sgd.) GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

152 Before the Interstate Commerce Commission. Ex Parte 102.
Application of the American Barge Line Company

Petition of the American Barge Line Company for the establishment of through rail-barge-rail rates on cotton in carload lots from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

AMERICAN BARGE LINE COMPANY,
By ANDREW P. CALHOUN,
Vice President.

Dated at Louisville, Ky., October 31, 1932.

May it please the Commission: Comes now your petitioner, the American Barge Line Company, and petitions the Commission to establish through rail-barge-rail rates on cotton in carload lots from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

This request is based upon the provisions of section 3 (E) of the Denison Act, and conditions and necessities now existing.

STATEMENT

The American Barge Line Company has been granted a certificate of public convenience and necessity by the Commission by the original order in this case for operation between Pittsburgh, Pa., and New Orleans, La., and intermediate ports.

The original order in this case fixed reasonable minimum differentials between all rail rates and joint rates in connection with our service on the commodity herein mentioned, and between the territories herein described.

153 Based on this minimum differential the rail carriers supplemented the all-rail cotton tariffs and showed for our account this minimum differential to apply against the then existing all-rail rates.

On August 2, 1932, the southwestern carriers filed their tariff S.W.L. No. 208, I.C.C. No. 2437, naming carload rates between the origin and destination territories herein named, but have not carried forward for our account the minimum differential fixed by the Commission in its order in this case. On the contrary, they petitioned the Commission that we be denied the privilege of partici-

pating in these tariffs. This in itself is an admission on their part that the differential fixed by the Commission should apply in these tariffs until changed by the Commission.

The Commission in its letter of October 21, 1932, denied the petition of the southwestern rail carriers, but at the same time suggested that we file this petition asking for new differentials for our account. A portion of the Denison Act reads as follows:

"The Commission shall in such order fix minimum reasonable differentials between all-rail rates and joint rates in connection with said water service to apply until changed by order of the Commission."

In the order in Ex Parte 102 the Commission complied with this part of the Denison Act, but the railroads have not complied with the order in Ex Parte 102. Under the Denison Act the Commission does not prescribe the rate, but it fixes a differential to apply to rail rates, which differential shall apply until changed by order of the Commission, and in our opinion the increasing or decreasing of a rail rate does not eliminate the participation in this rate by a water carrier, nor in our opinion is it necessary for the water
154 carrier to again petition the Commission to participate in a rate merely because the through all-rail rate has been increased or decreased. If this were the case, a general increase or decrease of rail rates would immediately nullify our certificate of public convenience and necessity and we would again have to ask the Commission to allow us to participate in rail tariffs.

We respectfully submit the foregoing for your consideration, but in order to comply with the wishes expressed in your letter of October 21, 1932, we are herewith filing this petition in order that we may participate in the cotton traffic, to which participation we think we are already entitled.

RATES AND ROUTES SOUGHT

We herein seek an order for the establishment of through rail-barge-rail rates on cotton, carloads, from all points in Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, applicable via rail carriers to Memphis, Tennessee; American Barge Line Company, Memphis, Tennessee, to *Pittsburgh, Pennsylvania; and rail carriers from *Pittsburgh, Pennsylvania, to destination.

We request that the Commission fix the following minimum differentials between the all-rail rates shown in tariff S.W.L. No. 208, I.C.C. No. 2437, in connection with our service:

Cars 40'7" and under	Cars over 40'7"	Differentials
Minimum weight 25,000 lbs	40,000 lbs	11¢ per cwt.
Minimum weight 35,000 lbs	55,000 lbs	10¢ per cwt.
Minimum weight 50,000 lbs	80,000 lbs	9¢ per cwt.

*Including Glassport, Aliquippa, Ambridge, Colona, and Conway, Pennsylvania.

The differentials herein sought were arrived at by applying
155 the formula prescribed in the original order in this case to a theoretical reduced carload all-rail rate between Memphis, Tennessee, and * Pittsburgh, Pennsylvania, our ports of interchange; the theoretical rates being arrived at by reducing the Memphis-Pittsburgh "any quantity" rail rate by the same percentages as the "any quantity" rail rates were reduced in forming the carload all-rail rates Little Rock, Arkansas, to Boston, Massachusetts.

For your information, we understand that the Federal Barge Lines (Inland Waterways Corporation) have agreed with the southwestern carriers, and have established the following differentials on cotton originating in Arkansas, destined to New Orleans, Louisiana.

Cars 40'7" and under	Cars over 40'7"	Differentials
Minimum weight 25,000 lbs.	40,000 lbs.	5¢ per cwt.
Minimum weight 35,000 lbs.	55,000 lbs.	3¢ per cwt.
Minimum weight 50,000 lbs.	80,000 lbs.	2¢ per cwt.
Minimum weight 65,000 lbs.	Capacity of car, but not less than 80,000 lbs.	No differential.

We do not know what method the rail carriers and the Federal Barge Lines used in arriving at these differentials, but undoubtedly the factor of circuity and the measure of the rate must have played an important part. As a concrete example, the all-rail carload rate from Little Rock, Arkansas, to New Orleans, Louisiana, is the same as the all-rail carload rate from Memphis, Tennessee, to New Orleans, Louisiana, and the direct rail line from Little Rock, Arkansas, to New Orleans, Louisiana, does not pass through Memphis, Tennessee. When the Federal Barge Lines pay the rail carriers a division on this traffic up to Memphis, Tennessee, the amount left is so small that the Federal Barge Lines could not afford to make a large differential. On the traffic we desire to participate in, the rail-water-rail route is in line with the all-rail route, and there-
156 fore, petitioner can afford to offer a larger differential.

On August 2, 1932, the southwestern lines issued S. W. L. Tariff No. 208, I.C.C. No. 2437, naming carload rates, which rates became effective September 6, 1932, in spite of tremendous opposition. Petitioner feels that under the order in this case it has a full right to participate in these rates, and is hereto attaching as appendix "A" a schedule setting forth the various steps it has taken to become a party to these rates. As the Commission knows, traffic has been moving and is now moving under the carload rates, and we respectfully request that a hearing not be held, but an order on short notice be issued against the rail carriers directing them to allow us to participate in this traffic.

Your petitioner has equipped itself with terminals, boats, and barges to participate in this traffic.

* Including Glassport, Aliquippa, Ambridge, Colona, and Conway, Pennsylvania.

The rail carriers involved are listed in our original application in this case, and have been furnished with a copy of this petition.

Respectfully submitted.

AMERICAN BARGE LINE COMPANY,
By ANDREW P. CALHOUN,
Vice President.

Louisville, Ky., October 31, 1932.

Appendix A

Date	Subject
Mar. 11, 1932.	Order in Ex Parte 102 issued.
Sept. 7, 1932.	Issuance of Supplement No. 17 to S.W.L. Tariff No. 176-A, I.C.C. No. 2402, providing rates on cotton, any quantity, via American Barge Line Company.
Sept. 19, 1932	Effecitve date of Supplement No. 17 to S.W.L. Tariff No. 176-A, I.C.C. No. 2402.
Aug. 13, 1932	Petition filed by Southwestern carriers to modify Order in Ex Parte 102 requesting that American Barge Line Company be not allowed to participate in reduced cotton rates.
Aug. 31, 1932	Answer of American Barge Line Company to Southwestern Lines' Petition.
Sept. 15, 1932	Informal conference at Washington, D.C., with Mr. Howard Hosmer, attorney and examiner.
Sept. 19, 1932	Letter to Chairman Leland with copies to Chairman Van Ummerson, Morris, and Wilson asking for conference to discuss cotton rates.
Sept. 20, 1932	Reply from Chairman Leland to above letter advising that letter had been passed to a sub-committee for handling. No further advice received.
Sept. 27, 1932	Letter to Chairman Leland requesting a conference for October 3, 1932.
Sept. 29, 1932	Chairman Leland advised he would be in St. Louis on October 3, 1932.
Oct. 3, 1932	Meeting in St. Louis with Chairman Leland and Mr. J. A. Brown, A.V.P., Missouri Pacific Railroad Company.
Oct. 4, 1932	Letter from Mr. Howard Hosmer asking if we had conferred with Southwestern carriers.
Oct. 7, 1932	Letter to Mr. Hosmer advising we had meeting.
Oct. 10, 1932	Letter to Mr. Hosmer suggesting basis of rates.
Oct. 21, 1932	Meeting with Southwestern carriers in the office of Mr. J. A. Brown, A.V.P., Missouri Pacific Railroad Company in St. Louis.
Oct. 21, 1932	Letter from Secretary McGinty stating Southwestern Lines' petition had been denied.

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Plaintiff's Exhibit "B"

Interstate Commerce Commission, Washington

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of

petition of the American Barge Line Company for the establishment of through barge-rail rates on cotton in carload lots from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, filed November 7, 1932, in Ex Parte No. 102, application of American Barge Line Company, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 12th day of January, A.D. 1933.

[SEAL.]

(Sgd.) GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

160 Before the Interstate Commerce Commission. Ex Parte 102.
Application of the American Barge Line Company

Petition of the American Barge Line Company for the establishment of through barge-rail rates on cotton in carload lots from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

Dated at Louisville, Ky., November 5, 1932.

May it please the Commission:

Comes now your petitioner, the American Barge Line Company, and petitions the Commission to establish through barge-rail rates on cotton in carload lots from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

This request is based upon the provisions of section 3 (E) of the Denison Act, and conditions and necessities now existing.

STATEMENT

We respectfully refer you to our petition of the American Barge Line Company, dated October 31, 1932, for the establishment of through rail-barge-rail rates on cotton in carload lots from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

RATES AND ROUTES SOUGHT

We herein seek an order for the establishment of through barge-rail rates on cotton, carloads, from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, applicable via American
161 Barge Line Company, Memphis, Tennessee, to * Pittsburgh, Pennsylvania, and rail carriers beyond.

* Including Glassport, Aliquippa, Ambridge, Colona, and Conway, Pennsylvania.

We request that the Commission fix the following minimum differentials between the all-rail rates shown in Agent F. L. Speiden's Tariff No. 216, I.C.C. No. 1477, in connection with our service:

Commodity Description and Minimum Weight	Differential
Description "A" as shown in Item 192¼ of Supplement No. 77 to Agent F. L. Speiden's I.C.C. No. 1477	10¢ per cwt.
Description "B" as shown in Item 192¼ of Supplement No. 77 to Agent F. L. Speiden's I.C.C. No. 1477	10¢ per cwt.

The basis for the differentials herein sought is the same as set forth in our Petition of October 31, 1932.

Your Petitioner has equipped itself with terminals, boats, and barges to participate in this traffic.

The rail carriers involved are listed in our original application in this case, and has been furnished with a copy of this petition.

Respectfully submitted.

AMERICAN BARGE COMPANY,
By ANDREW P. CALHOUN,
Vice President.

Louisville, Ky., November 5, 1932.

162, 163 *Plaintiff's Exhibit "C"*

Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of reply of Southwestern Carriers to petitions of American Barge Line Company for the establishment of (1) through rail-barge-rail rates on cotton, in carload lots, from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, dated October 31, 1932, and (2) for the establishment of through barge-rail rates on cotton, in carload lots, from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, dated November 5, 1932, and request for hearing upon said petitioners, filed November 14, 1932, in Ex Parte No. 102, application of American Barge Line Company, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 12th day of January, A.D. 1933.

[SEAL.] (Sgd.) GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

164 Before the Interstate Commerce Commission. Ex Parte No. 102. Application of American Barge Line Company

Reply of southwestern carriers to petitions of American Barge Line Company for the establishment of (1) through rail-barge-rail rates on cotton, in carload lots, from all points in the State of

Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, dated October 31, 1932, and (2) for the establishment of through barge-rail rates on cotton, in carload lots, from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, dated November 5, 1932, and request for hearing upon said petitions.

R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, C. S. Burg, M. G. Roberts, B. F. Batts, J. P. Stewart, Robt. Thompson, H. H. Larimore, Geo. W. Holmes, Attorneys for Southwestern Carriers, 2008 Mo. Pac. Bldg., St. Louis, Missouri.

November 12, 1932.

165 Before the Interstate Commerce Commission. Ex Parte No. 102. Application of American Barge Line Company

Reply of southwestern carriers to petitions of American Barge Line Company for the establishment of (1) through rail-barge-rail rates on cotton, in carload lots, from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, dated October 31, 1932, and (2) for the establishment of through barge-rail rates on cotton, in carload lots, from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, dated November 5, 1932, and request for hearing upon said petitions.

Come now southwestern rail carriers and present the following as their reply to petitions of the American Barge Line Company (hereinafter referred to as Barge Line) seeking differentials under all-rail port-to-port rates (1) rail-barge-rail rates on cotton, in carload lots, from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, which are differentially under the all-rail rates from said origins to said destinations; and (2) the establishment of through barge-rail rates on cotton, in carload
166 lots, from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, which are differentially under the all-rail rates now in effect from said origins to said destinations.

An extended reply is unnecessary as the southwestern carriers in their joint and several protest and application for tariff suspension dated St. Louis, Missouri, October 26, 1932 (copy of which is attached hereto as appendix A), filed as protest against supplement 80 to Agent F. L. Speiden's Freight Tariff No. 216, I.C.C. No. 1477, completely and thoroughly sets out the effect differential rates via barge-rail routes will have not only upon the cotton rate adjustment in the Mississippi Valley and southwestern territories, but as

well upon the general conduct of cotton business within the southwestern and southern territories.

As we read the petitions of the Barge Line, the grounds for said differential rates under all-rail rates are, as follows:

1. Complete reliance upon the portion of the Denison Act, which reads as follows:

"The Commission shall in such order fix minimum reasonable differentials between all-rail rates and joint rates in connection with said water service to apply until changed by order of the Commission."

167 2. The fact that the southwestern carriers and the Federal Barge Line (Inland Waterways Corporation) have agreed upon and have established certain differentials on cotton originating in Arkansas when destined to New Orleans, Louisiana.

3. That the establishment by the southwestern carriers, effective August 29, 1932, of carload rates on cotton, and the elimination of minimum differentials, which petitioner alléges the Commission prescribed in its order in this proceeding, are not justified.

4. That petitioner "feels that under the order (Ex Parte No. 102) has a full right to participate in these rates", and requests that no hearing be held, but "an order on short notice be issued against the rail carriers directing them to allow us to participate in this traffic."

Upon the first contention advanced by the American Barge Line in support of its petitions, we cite the Commission's report in I. & S. Docket No. 3399, Cotton and Cotton Linters from Southern and Southwestern States to New Orleans, Louisiana, and Mobile, Alabama, via Rail and Barge Rates, 183 I.C.C. 33, which proceeding had to do with the establishment of rail-barge rates and rates on cotton and cotton linters, any quantity, from points in the South and the Southwest to New Orleans, Louisiana, and Mobile, Alabama, over the Federal Barge Lines operated by the Inland

168 Waterways Corporation, the question presented being what routes and rates, if any, should be established in addition to those already in effect."

In that proceeding, which was not only an investigation and suspension proceeding, but as well included the formal complaint filed by the Inland Waterways Corporation operating Mississippi-Warrior Service et al. v. Abilene & Southern Railway Co. et al., and bearing Docket No. 23188, seeking the establishment of "through rail-barge routes and joint domestic and export rates over such routes on cotton and cotton linters to New Orleans from the Southwest and to Mobile and New Orleans from the South"; and further, alleged that in failing to prescribe rates from the additional points of origin (not embraced by order in Ex Parte No. 96) specified in the complaint, the Commission did not comply with the Denison Act.

The Commission in that case commented as follows:

"The Denison Act authorizes us upon complaint of an interested carrier or carriers, but 'upon reasonable notice, to enter upon a hear-

ing' concerning the reasonableness or lawfulness of any joint rate filed pursuant to orders such as that entered in Ex Parte No. 96, or the reasonableness in minimum differentials between all-rail rates and joint rates in connection with any water service." (Emphasis ours.)

The petitions of the American Barge Line to which this is reply specifically request that no hearing be held, and further than "an order on short notice be issued against the rail carriers directing them to allow us to participate in this traffic."

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Copies of petitions were not served upon any Southwestern line so far as we are able to determine, and copy was only secured upon request after receiving advice through other channels that said petitions had been filed.

Briefly stated, the history of the cotton rates in the Southwest within the past few years is, as follows:

The Commission entered upon an investigation into the cotton rates in its Docket No. 17000, part 3, Cotton, and thoroughly and exhaustively investigated the rates to, from, and within the Southwest, which is reported at 165 I.C.C. 595.

Subsequent to the establishment of the rates prescribed in the last-cited report, on June 15, 1931, a large portion of the cotton movement, amounting in many localities to more than one half the crop, was diverted from the rail lines to unregulated truck and river transportation agencies. The rail carriers immediately set about to retrieve such traffic because of the revenue loss resulting from the handling of this principal commodity of traffic by unregulated forms of transportation.

In consequence of such investigation and study, resort was had to a basis of carload rates which represented a very radical departure from past practice in fixing cotton rates. Such rates were decided upon and published, and because of the agitation that resulted from such publication, the Commission held a hearing at Washington, D.C., on August 17 to 21, inclusive, 1932, to determine whether this new and novel style of freight rates, which were frankly admitted by the carriers to be experimental in nature, should be suspended. The conclusion of the Commission was that such rates seemingly offered the carriers their only opportunity to meet the competitive situation with which they were confronted and the suspension requests were consequently denied.

170

The contention of the Barge Line that they are entitled to differential rates by the provisions of the Denison Act without hearing upon the reasonableness of the differential which they ask to be established under all-rail rates or the resulting barge-rail or rail-barge-rail rates, is fallacious in the extreme: First, for the reason that, as stated above, the present all-rail cotton rates, in effect only since August 29, 1932, are experimental in nature and are published only in an endeavor to retrieve traffic lost to unregulated forms of transportation of which the petitioner is a part; second, that the Denison Act does not require the Commission by mere application alone to

establish differentials under all-rail rates without an investigation into the reasonableness of the differentials and the resulting
171 rates under such differentials.

As to the second contention of petitioner, i.e., that the carriers and the Federal Barge Line have agreed upon certain differentials and rates and routes on cotton moving from Little Rock, Arkansas, to New Orleans, Louisiana, is of no probative force and effect, insofar as the petition of this Barge Line for the establishment of differentials under all-rail rates presently in effect from Memphis and Arkansas points to various Eastern States without hearing into the reasonableness of the differential and the resulting barge-rail and rail-barge-rail rates under such differential.

Because of the experimental nature of the rates which are published to expire on July 31, 1933, and which are compelled rates because of the reduction under the rates prescribed by the Commission in Docket No. 17000, part 3, and only was permitted to become effective upon a full showing of loss of tonnage by reason of much lower rates via other transportation agencies, which lower rates were made by divers means, the rail rates now in effect are of such a nature as to require that the carriers be permitted the completion of its test without the interruption of further reduction by the Barge Line, and the diversion of traffic by such forms of transportation without
172 full proof of the necessity for such differential, and that the differential rates that would result are reasonable and compensatory. This, we submit, can only be determined after a complete investigation and hearing in support of the petitions as filed.

The Barge Line urges its right to a participation in this traffic, and requests that hearing upon its petitions be not held. Such request, we submit, is entirely not in accord with the actual facts surrounding the present rates upon which cotton traffic is moving. The experimental rates of the carriers are low in level. To permit this Barge Line to further reduce the rates from a territory which in scope may be considered to be not only the entire State of Arkansas, but as well a radius of 150 miles of Memphis, the effectiveness of the differential would recreate truck-barge competition, which took from the carriers during the season of 1931–1932 more than one half of the cotton traffic.

The Barge Line asks for rates from all points in Arkansas to all destinations in certain States without any limitation or provision whatsoever that any formula will be followed in making such rates. Applying the formula set up by the Commission in its decision in Ex Parte No. 102 to the point-to-point situations, the Barge Line will not have rates to all such points under the application of the differentials sought.

173 The Commission's attention is directed to the attempt of the Barge Line, through the medium of these petitions, to secure a substantial extension of the origin and destination territory from and to which rates would apply if subjected to the requirements and the restrictions as to circuity and service set up

in the original orders in Ex Parte No. 102. As illustrative of this condition and representing a typical movement, it will be found that the short-line distance from Little Rock, Arkansas, to Boston, Massachusetts, is 1,479 miles, and 50 percent of this distance, 740 miles. The distance from Little Rock to Memphis, Tennessee, is 132 miles, and the distance from Pittsburgh (the port of interchange on the destination end) to Boston is 663 miles, resulting in a total rail distance of 795 miles, or 55 miles in excess of the limitation fixed by the Commission as relating to rail service.

Using Boston as a typical illustration in the heavy consuming territory, it will be found that from Fort Smith the excess distance is 149 miles; Texarkana, 129 miles; Newport, Arkansas, 63; Pine Bluff, Arkansas, 45 miles. From these well-scattered locations it is obvious that under the limitations of the original order in Ex Parte No. 102 very little of the heavy cotton consuming territory would be reached from Arkansas.

These petitions seemingly are an attempt on the part of the
174 Barge Line to secure from the Commission, without the benefit of its usual careful consideration and without the benefit of a public hearing and full information in respect to the public interest in the matter, a basis or system of rates greatly beyond the scope of any system of rates which might be obtained under the limitations which the Commission has seen fit to prescribe for joint-rail and rail-barge rates.

Apropos of the foregoing, it is significant that in the rates that have been published differentially under the any-quantity rates fixed in Docket No. 17000, part 3, supra, and which rates have been accepted by the Barge Line as complying with the Commission's order, no rates are published from any Arkansas origin to the Boston group, which includes a substantial majority of the consuming points to which this cotton moves. This statement may be verified from an examination of Supplement No. 17 to Southwestern Lines' Tariff No. 176-A, I.C.C. No. 2402. It is difficult to conceive on what grounds the Barge Line can contend that it is entitled to participate in joint rail-barge-rail carload cotton rates differentially under materially depressed and competitive all-rail rates, whereas the Barge Line does not and has not contended that it should be permitted to participate in rates made differentially under the reasonable maximum any-quantity rates fixed by this Commission in I.C.C.

175 Following mature consideration by the Commission in a detailed decision and upon a full record, the Commission in Ex Parte No. 102 prescribed certain differential bases to be observed in connection with reasonable maximum all-rail rates, and in its discretion and wisdom, and for the reasonable protection of the rail carriers, laid down specific limitations upon their requirements, insofar as origin and destination territory involved were concerned. Several of these orders, all fashioned after the same pattern, have been vigorously attacked by various river carriers, and this Commission has consistently declined to extend the territorial scope of their

orders. We have here the spectacle of the American Barge Line blandly ignoring the accumulated precedents expressive of the Commission's views in this respect; and in petitions, copies of which were not even served on the Southwestern Lines, asking the Commission to materially extend the scope of its previous orders in the proceeding, selecting as their objectives origin and destination territories of the utmost importance from a tonnage standpoint, without giving the rail carriers their day in court.

Herein and in appendix "A" these rail carriers have portrayed for the Commission a few of the more striking and salient
176 facts which are at once apparent in the consideration of the effects of the granting of the petitions of the American Barge Line. It should be obvious that grave injury, and, in truth, irreparable damage would industiably be done not only to these rail carriers, but also to the interests of their customers—farmers, planters, compress operators, shippers, consuming mills in the Southeast and Carolinas, operators of port facilities, connecting rail lines operating through long-established gateways, and others who use their rails and facilities in the marketing and distribution of the Arkansas cotton crop, which is the most important product in terms of value of any product, agricultural, manufactured, or otherwise, in the State of Arkansas.

With the economic fate of these interests in its hands, it is inconceivable to these carriers that the Commission would arbitrarily and without the benefit of the important information which a full and complete record may reasonably be expected to develop, act in anywise favorably upon the petitions of the American Barge Line. The rail carriers are confident that no such disorderly procedure will follow and feel that enough has been said to indicate to the Commission the extraordinary gravity of the problem which springs from these petitions.

The Southwestern lines feel that, having regard to the char-
177 acter and history of the present carload cotton rates, no differential rates in connection with the Barge Line should be made effective or required by the Commission.

Request that petitions be set down for public hearing

We have hereinabove shown the many interests that are affected by the differential rates which the Barge Line seek, and in view of that showing, Southwestern carriers respectfully urge that the petitions be set down for public hearing or hearings at points within the involved origin area to the end that all interests may have their due right to make known to the Commission in what manner and to what extent their interests may be affected. Such a hearing may confidently be expected to develop important information not now in the Commission's possession, and which will unquestionably merit the most careful scrutiny and study before any profoundly disturbing and obnoxious and prejudicial arrangements such as sought in these protested petitions are seriously considered by the Commission.

The Illinois Central system and other east side lines have authorized the undersigned to say they concur in the position of the Southwestern lines but reserve the right to file a supplemental reply to these petitions.

Respectfully submitted.

178 R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, C. S. Burg, M. G. Roberts, B. F. Batts, J. P. Stewart, Robt. Thompson, H. H. Larimore, Geo. W. Holmes, Attorneys for Southwestern Carriers, 2008 Mo. Pac. Bldg., St. Louis, Missouri.

November 12, 1932.

179 *Appendix "A"*

Before the Interstate Commerce Commission

Application of southwestern carriers for the suspension of certain schedules contained in supplement no. 80 to agent F. L. Speiden's freight tariff no. 216, I.C.C. no. 1477, established to become effective November 10, 1932.

Joint and several protest and application for tariff suspension

R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, C. S. Burg, M. G. Roberts, F. F. Batts, J. P. Stewart, Robt. Thompson, E. A. Smith, H. H. Larimore, Geo. W. Holmes, attorneys for protestants, 2008 Mo. Pac. Bldg., St. Louis, Mo.

October 26, 1932.

180 Before the Interstate Commerce Commission

Application of southwestern carriers for the suspension of certain schedules contained in supplement no. 80 to agent F. L. Speiden's freight tariff no. 216, I.C.C. no. 1477, established to become effective November 10, 1932.

Joint and several protest and application for tariff suspension

Come now The Atchison, Topeka & Santa Fe Railway Company, The Chicago, Rock Island & Pacific Railway Company, The Kansas City Southern Railway Company, Kansas, Oklahoma & Gulf Railway Company, Midland Valley Railroad Company, Louisiana & Arkansas Railway Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, St. Louis Southwestern Railway Company, Texas and New Orleans Railroad Company, The Texas and Pacific Railway Company, Illinois Central Railroad Company, and other

southwestern lines parties defendant to I.C.C. 17000, part 3, Cotton, hereinafter referred to as protestants, and hereby protest against supplement no. 80 to Agent F. L. Speiden's freight tariff no. 216, I.C.C. no. 1477, particularly as to item 4-A on page 9 thereof, which is as follows:

181 *Nonapplication of rates*

Item	Via—	From—	To—	Application or exception
4-A (Cancels item 4 of supplement 63).	ABL	Memphis, Tenn.	Stations in Ohio, except Painesville on and east of the line of the Erie, Phalanx, Ohio, to Youngstown, Ohio, inclusive, P. & L. E., Youngstown, Ohio to Pa.-Ohio State line, inclusive, and stations located in States of Penna., N.Y., N.J., Conn., Mass., and R.I.	Rates apply only as provided in item 101 and only via Glassport, Pa. Note.—Aliquippa and Ambridge, Pa., eliminated.

182 and Item 101-A on page 14 thereof, which is as follows:

"Item 101-A. (Cancels item 101 of supplement 63). Basis for rates in connection with ABL and rail lines parties hereto or as same may be amended. (See item 4-A.)

"Rates on cotton, in bales, as described in item 190 to points named in item 4-A from Memphis, Tenn., are the through rates shown in tariff, as amended, less a differential of 15 cents per 100 pounds, subject to exceptions shown below:

"Rates on cotton, in bales, as described in item 192-A (descriptions A and B) to points named in item 4-A from Memphis, Tenn., are the through rates shown in tariff, as amended, less a differential of 15 cents per 100 pounds on description A, and 17 cents per 100 lbs. on description B, subject to exceptions shown below.

"(a) While shipments moving under the rates herein authorized, are in possession of ABL, the bill of lading, terms and conditions of that line as set forth in their circular 3, I.C.C. 4, supplements thereto or successive issues thereof will govern." (In compliance with order of the Interstate Commerce Commission in Ex Parte 102 of May 19, 1932.)

and protestants request, pursuant to the provisions of paragraph (7) of section 15 of the Interstate Commerce Act, that the Interstate Commerce Commission, by its order, suspend the operation of such tariff and all schedules therein contained pending hearing thereon and investigation thereof by this Commission. In support of this protest and request for suspension, your protestants respectfully represent and show unto the Commission as follows:

I. *History of Present Rates*

183 On June 15, 1931, there became effective between points in the United States a revised basis of freight rates on cotton in compliance with the orders of the Interstate Commerce Commis-

sion in Docket 17000, part 3, Cotton, 165 I.C.C. 595. Subsequent to the establishment of these rates and during the cotton season of 1931–1932, a large proportion of the movement, amounting in many localities to more than half the crop, was diverted from the rail lines to unregulated truck and river transportation agencies. The investigation which the carriers made of the competitive situation thus brought about developed that the level of the rates necessary to retrieve the traffic would be so low that there would be serious doubt as to whether, or not, the revenues therefrom would be remunerative if the traffic were handled on the usual basis, i.e., any quantity cotton rates. In consequence, resort was had to a basis of carload rates, a very radical departure from past practices. A great deal of agitation followed as a result of which the commission held hearings at Washington, D.C., on August 17th to 21st, inclusive, 1932, to determine whether this new and novel system of freight rates, which was frankly admitted by the carriers to be experimental in nature, should be suspended. The conclusion of the Commission was that such rates seemingly offered the carriers their only opportunity to meet the competitive situation with which they were confronted and the suspension requests were consequently de-
184 nied. In passing, but of no little importance, may be mentioned the fact developed at the hearing above referred to that the American Barge Line, by means of secret rates, private contracts, unregulated and unrestrained practices, was the leading and chief competitor in the movement of cotton from Memphis, Tenn., to the Gulf. From New Orleans, the cotton was moved by unregulated steamship lines to Atlantic seaports and thence to other destinations by truck from such ports to interior consuming points.

Having established this revised scheme of carload freight rates from Memphis and surrounding territory on both sides of the river, effective August 29, 1932, the rail carriers find that the freight rates which they set up to meet unregulated and secret rates of the American Barge Line for the movement of this traffic have now been used as the basis for establishing differential rates upstream from Memphis in connection with the American Barge Line to Glassport (Pittsburgh), Pa., and thence rail connections to New England destinations.

By item no. 101-A appearing on page 14 of Agent Speiden's Supplement No. 80 to Tariff No. 216, I.C.C. No. 1477, it is provided as follows: "Rates on cotton, in bales, ——— are through rates shown in tariff, as amended, less a differential of 15 cents per 100 pounds on description A (cotton delivered compressed, not including
185 cost of compression), and 17 cents per 100 pounds on description B (including 12 cents per 100 pounds, compression cost) ———."

The present all-rail rate on cotton delivered carrier compressed, or uncompressed, not including any cost for compression, from Memphis, Tenn., to Boston, Mass., is 74 cents per 100 pounds, minimum weight 37,500 pounds per car.

The present all-rail rate on cotton delivered carrier in uncompressed bales to be compressed in transit is the cost of compression, i.e., 12 cents per 100 pounds higher than the rate on cotton delivered carrier compressed, or 86 cents per 100 pounds; the 12-cent figure mentioned being the actual cost of compression, and the entire amount is paid over by the rail carriers to the compress company for such service.

Item 101-A carries the further note: "In compliance with order of the Interstate Commerce Commission in Ex Parte 102 (application of American Barge Line, 182 I.C.C. 521) of May 19, 1932." The presumption attaching to such statement is that the differentials of 15 and 17 cents per 100 pounds under all-rail rates is the establishment of a 20 percent differential of the port-to-port all-rail rate upon what is generally termed the Ex Parte No. 96 formula (through routes and joint rates, 153 I.C.C. 129). As a matter of fact the flat application of the 15- and 17-cent differentials create differentials in excess of 20 percent.

186 The present all-rail rates on cotton from Memphis, Tenn., and the Southwest to the entire Central Freight Association and Eastern Trunk Line territories and Canadian mill points are blanketed. The 74-cent rate to Boston and other eastern points is applied as a maximum rate at intermediate points in all of said destination territory.

Theoretically the 15- and 17-cent differentials, which the barge line here proposes, are in accord with the ex parte 96 formula (or 20 percent of the all-rail port-to-port rate) because, due to the application of the all-rail rates from the Memphis-Little Rock group to this large destination territory on a blanket basis, the port-to-port rate from Memphis to Pittsburgh happens also to be 74 and 86 cents, respectively. However, protestants do not feel that it is just to apply the percentage differential to the present all-rail rates which are only effective at intermediate points because of observance of the provisions of the fourth section of the act. Further, it was certainly neither the intent of Congress, or the Commission, that charges collected by carriers for compression and by them paid to the compress in toto should be used as a measure for differential water rates. The application of the 20 percent formula to the 86-cent rate, which is actual cost of compression of 12 cents plus the 74-cent

187 rate, when used as a measure for the 17-cent differential makes the differential in fact approximate 23 percent instead of 20 percent.

Under this application of a rate 17 cents per 100 pounds less than the all-rail rate of 86 cents on cotton with carriers privilege of compression, the American Barge Line is, in fact, applying 20 percent of the actual compression cost paid to the compress and thereby nullifies the 15-cent differential in connection with the 74-cent rate. As an example, under the 15-cent differential, cotton delivered to the American Barge Line by shipper in compressed bales would actually cost such shipper the charge for compression of 12 cents per

100 pounds plus the barge-rail rate of 59 cents per 100 pounds (15 cents under all-rail rate of 74 cents), or a total of 71 cents through from Memphis, Tenn., to point of destination. Whereas, if the same cotton were delivered to the American Barge Line in uncompressed bales with instructions that such cotton be compressed in transit, this cotton would be then handled from Memphis, Tenn., to destination at rate of 69 cents per 100 pounds (17 cents under all-rail C.I.T. rate of 86 cents), out of which the American Barge Line would pay to a compress company actual cost of compression of 12 cents per 100 pounds. Under the latter handling, a saving of 2 cents per 100 pounds would accrue to the shipper over and above what he would pay if cotton were handled under the 15-cent differential
188 basis. It is evident that this plan of handling would be adopted by the shippers and that, as stated above, the differential, instead of being 20 percent under the port-to-port all-rail rate, would be approximately 23 percent thereof.

Protestants maintain that, in view of the fact that the present cotton rates are compelled rates and designed and permitted to become effective as an experimental measure to permit the carriers a participation in the cotton transportation, there is no justification for any differential barge-rail under all-rail rates.

II. No notice to public was given of the proposed change in rates

Both by custom and agreement with organized shippers, any material change in the freight rate structure must be placed on the public docket of the various freight bureaus for discussion. This tariff, since it will change the entire flow of cotton traffic, is certainly a material change. Nevertheless, this change was not docketed and, as a matter of fact, even the subscribing rail carriers were unaware of its publication, being unable to check incoming tariffs as carefully as they should due to the financial stringency.

III. Proposed basis of rates will cause reestablishment of extensive truck competition

189 By the experience of the southwestern carriers during the cotton season of 1931–32, if the proposed rates are permitted to become effective, cotton from the producing area within 150 miles radius of Memphis will move to Memphis by truck.

Memphis, Tenn., is the largest interior cotton market in the world from which point cotton moves to all consuming points of the globe. On the initial move from the producing point in Arkansas, Mississippi, etc., into Memphis, Tenn., the owner of such cotton does not at that time know to what point that cotton may finally move. Past experience developed that where a very low rate was in effect from Memphis, Tenn., to any given destination via transportation agencies other than rail carriers, it was more advantageous to the owner of cotton to see that the cotton was delivered at Memphis,

Tenn., free from any rail regulations requiring that the cotton be reshipped from Memphis, Tenn., via rail lines. For example, last season when the barge rate to New Orleans was drastically cut, this so-called free cotton in storage at Memphis increased from 106,886 bales to 646,116 bales. Such cotton demanded a premium over cotton brought into Memphis, Tenn., by rail lines, due to the fact that while rail carriers published so-called "floating-in" rates which are materially lower than local rates, such floating-in rates while
190 applied to the initial move to transit point are contingent upon the cotton moving out of Memphis, Tenn., via rail lines and if cotton moving under such floating-in rates in the first instance does not eventually move out by rail lines, carriers, under the tariffs as published, require that such floating-in charges be increased to full local rates, which are today on basis of the rates prescribed by the Commission in Docket 17000, part 3. The floating-in charges as applied to the initial move to transit point were designed to be approximately the amounts charged by unregulated trucks for that movement by such unregulated carriers. If this low basis of rates is permitted to become effective via the American Barge Line, we will have, in effect, such a situation as mentioned above whereby a much lower rate than the all-rail rate would be in effect via transportation agencies other than rail, and would be a compelling reason why free or nonrail cotton would demand a premium.

IV. Will strip interior smaller markets of cotton and destroy their usefulness

The 1932 cotton crop is estimated at 11,425,000 bales.

The production within 150-mile radius of Memphis is conservatively estimated at 20 percent of such total production.

191 The low barge-rail rate from Memphis to Eastern destinations will attract cotton from natural markets. As the Commission is aware from previous records, much of the cotton crop is purchased at or near the point of production by local buyers at the larger inland towns or villages. Nearly every town within the area of production large enough to support one or more cotton gins has its quota of cotton buyers. Under the rates here proposed such cotton will be trucked by independent truckers direct to Memphis for concentration to be in a position to obtain premiums offered for free or nonrail cotton so as to take advantage of the low barge-rail rate here proposed, thereby depriving the producers at the smaller markets of competitive buying and also destroying the markets at these smaller points. To follow up what we have said in the discussion under title III, cotton moving by unregulated truck from the country station to Memphis, Tenn., moves at a very low rate which is not tied up with or contingent upon the movement from Memphis, Tenn., being via any certain transportation agency, and, therefore the rate as paid to the nonregulated truck in the first instance is a final charge paid. If movement into

Memphis, Tenn., is by rail and the outbound movement does not meet the requirement of the tariffs, the inbound floating-in charges originally assesed by rail lines, as before stated, will be increased to the full local rates.

192 It must be borne in mind that cotton gin points are the primary markets and are not to be confused with compress points. There are literally hundreds of such primary markets within a radius of 150 miles of Memphis.

V. Will destroy the usefulness of interior compresses and the value of investments therein

Compress points located in the Southwest within radius of 150 miles of Memphis, Tenn., are: Caruthersville and Malden, Mo., Blytheville, Leachville, Jonesboro, Marked Tree, Truman, Walnut Ridge, Newport, Earle, Mariana, West Memphis, Helena, Pine Bluff, Cotton Plant, Searcy, Batesville, Morrillton, Conway, Little Rock, North Little Rock, McGehee, Forrest City, and Crossett, Arkansas, at which points cotton is received for concentration, compression, and/or storage. For the same reasons as expressed in connection with the destruction of competitive buying referred to in the next above paragraph, each of the points named above has one compress and several of them, two or more. Investments in these plants total millions of dollars which would virtually become useless if the flow of traffic is diverted as would be the result if this tariff is permitted to become effective.

193 We have hereinabove, under title I, shown the probable effect of the proposed rates upon cotton movements—how the published differentials of 15 and 17 cents under the effective port-to-port all-rail rates will in practical effect be in excess of such amounts and will exceed 20 percent thereof—how such differentials will, inevitably, change the flow of traffic which cannot but effectually destroy the interior compresses and the primary markets.

VI. Upsets cotton rate adjustments

The New England States and southeastern mills are in direct competition with each other and, under the present adjustment of all-rail rates, enjoy a relationship under which one group of mills can compete freely with the other. The present rate adjustment preserves a delicate balance which permits free competition and flow of the traffic without prejudice or preference to all consuming points. The present low price of cotton makes it all the more easy to disturb this adjustment, the difference of a few cents a bale in transportation costs looming much larger than the same difference would be were the price of cotton normal. The reduction proposed of 17 cents per 100 pounds amounts to approximately 85 cents per bale. This is an appreciable percentage of the present market value of the bale and sufficient to cause maladjustment in the rates to the Southeast

and Carolinas versus New England mill points and a possible disruption of the entire cotton rate structure in an attempt
194 to regain the delicate rate balance necessary for the free flow of the traffic.

In addition there is a serious menace in the rates to the New England consuming territory itself in that the present movement consists of either an all-rail movement from Memphis, or a rail and/or water movement from Memphis to New Orleans, thence to the New England ports by unregulated coastwise steamers. Undoubtedly, if the present adjustment is disturbed so that an undue amount of the traffic moves from Memphis north on the river through Pittsburgh, the coastline steamers operating out of New Orleans will not be slow to retaliate by a reduction in rates, whereupon pressure will be brought to bear by the port interests for both a lower rate on the river and thereby compel a lower rail rate into ports. Thus we begin a vicious cycle in which the rail carriers are caught between the upper and nether mill stone, the water carriers Memphis to Pittsburgh reducing their rates, forcing the rail carriers to join them, followed by a reduction of the coastwise steamers from New Orleans, forcing a reduction in the rail rate to New Orleans, presently followed by another reduction in the barge-rail rates, Memphis to Pittsburgh, and another reduction in coastwise steamers, and so on ad infinitum.

VII. Proposed rates will create fourth section violation

195 Rates which are published in connection with the American Barge Line on the basis prescribed in Ex Parte No. 102 are protected as regards fourth section departures resulting therefrom by fourth section order no. 10953.

It is apparent from a superficial analysis of this publication that it transcends the limitations or provisions of the authority and requirements as to joint rates contained in the Commission's decision in Ex Parte No. 102, and it necessarily is without fourth section relief, inasmuch as the relief contained in F.S.O. no. 10953 protects only departures which result from compliance with the Commission's order.

VIII. The present cotton rates are experimental

As before stated, the present cotton rates within and to and from the Southwest, which became effective August 29, 1932, will expire July 31, 1933. The intent of such rates was to determine the ability of rail carriers to compete in the transportation of cotton as against the unregulated forms of transportation with which such disastrous experience was had during the season of 1931–1932, when the rail rate structure then effective was that which the Commission had prescribed in its Docket 17000, part 3. In considering the proposals of the American Barge Line in the tariffs here under con-

sideration sight should not be lost of the fact that the South-
196 western carriers are undertaking an experiment. If that experiment is to be continually deflected or disturbed by disruptions of the basic structure such as here proposed, it will be wholly impossible for any definite conclusion to be drawn therefrom.

CONCLUSION

In view of the foregoing and being of the opinion that the rates announced by the American Barge Line and contained in supplement no. 80 to Agent F. L. Speiden's Tariff No. 216, I.C.C. No. 1477, will tend to create an unjustifiable condition in the rate structure, your petitioners respectfully urge that the Commission by its order suspend said schedules and enter upon an investigation as to the lawfulness thereof, and that at the conclusion of such investigation find that such schedules have not been justified, are unlawful, and in an order require the same to be canceled.

Respectfully submitted.

The Atchison, Topeka and Santa Fe Railway Company, by R. G. Merrick, Assistant Freight Traffic Manager; The Chicago, Rock Island & Pacific Railway Company, by G. E. Schnitzer, Assistant Freight Traffic
197 Manager; The Kansas City Southern Railway Company, by J. R. Mills, Assistant Freight Traffic Manager; Kansas, Oklahoma & Gulf Railway Company, Midland Valley Railway Company, by R. H. Schultz, Traffic Manager; Louisiana & Arkansas Railway Company, by F. A. Key, Jr., Traffic Manager; Missouri-Kansas-Texas Railroad Company, by R. C. Trovillion, Freight Traffic Manager; Missouri Pacific Railroad Company, by D. R. Lincoln, Freight Traffic Manager; St. Louis-San Francisco Railway Company, by R. N. Nash, Freight Traffic Manager; St. Louis Southwestern Railway Company, by W. F. Knobeloch, Traffic Manager; Texas and New Orleans Railroad Company, by
198 Joseph Lallande, General Freight Agent; The Texas and Pacific Railway Company, by C. Schonfelder, General Freight Agent; Illinois Central Railroad Company, by Joseph Hattendorf, Assistant Freight Traffic Manager; R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, C. S. Burg, M. G. Roberts, B. F. Batts, J. P. Stewart, Robt. Thompson, E. A. Smith, H. H. Larimore, Geo. W. Holmes, Attorneys for Protestants, 2008 Mo. Pac. Bldg., St. Louis, Missouri.

October 2, 1932.

199 *Plaintiff's Exhibit "D"*

Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of reply of the Illinois Central Railroad Company, et al. to the petitions of the American Barge Line Company, filed November 17, 1932, in Ex Parte No. 102, Application of American Barge Line Company, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 24th day of February, A.D. 1933.

[SEAL.]

(Sgd.) GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

200 Before the Interstate Commerce Commission, Ex Parte No. 102, Application of American Barge Line Company

Reply of the Illinois Central Railroad Company, the Yazoo and Mississippi Valley Railroad Company, Southern Railway Company, Louisville & Nashville Railroad Company, St. Louis-San Francisco Railway Company, Gulf, Mobile and Northern Railroad Company, New Orleans Great Northern Railroad Company, Columbus and Greenville Railway Company, and Mississippi Central Railroad Company, supplemental to the reply heretofore made on behalf of the southwestern carriers, to the petitions of the American Barge Line Company for the establishment of (1) through rail barge-rail rates on cotton, in carload lots, from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut (petition date October 31, 1932), and (2) for the establishment of through barge-rail rates on cotton, in carload lots, from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut (petition dated November 5, 1932), and request for hearing upon said petitions.

W. N. MCGEHEE,
W. A. NORTHCUTT,
M. G. ROBERTS,
ELMER A. SMITH,
Attorneys for Respondents.
#135 East Eleventh Place, Chicago, Illinois.

November 14, 1932.

201 The southwestern rail carriers prepared under date of November 12, 1932, a reply to petitions of the American Barge Line Company, seeking establishment of (1) through rail barge-rail rates on cotton, in carload lots, from all points in the State of Arkansas to all points in the States of Pennsylvania, New York,

New Jersey, Massachusetts, Rhode Island, and Connecticut (petition dated October 31, 1932), and (2) through barge-rail rates on cotton, in carload lots, from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut (petition dated November 5, 1932).

It was stated on page 13 of the reply filed on behalf of the southwestern carriers to these petitions that the Illinois Central system (composed of the Illinois Central Railroad Company and The Yazoo and Mississippi Valley Railroad Company) and other east side lines, had authorized the southwestern lines to say that the former concurred in the position of the southwestern lines but reserved the right to file a supplemental reply to these petitions.

The carriers filing this supplemental reply, viz, the Illinois Central Railroad Company, The Yazoo and Mississippi Valley Railroad Company, Southern Railway Company, Louisville & Nashville Railroad Company, St. Louis-San Francisco Railway Company, Gulf, Mobile and Northern Railroad Company, New Orleans Great Northern Railroad Company, Columbus and Greenville Railway Company, and Mississippi Central Railroad Company, heretofore referred to as the east side lines, approved of everything said in the reply dated November 12, 1932, of the southwestern lines. The east side
202 lines in this supplemental reply direct the Commission's especial attention to the policies and practices of the American Barge Line Company as brought out in hearings that have recently been held respecting the rates on various commodities in the Mississippi Valley territory. The east side lines also suggest some additional considerations that in their judgment the Commission should have before it in passing upon the petitions of the American Barge Line Company.

The American Barge Line Company is the most notorious rate-cutter on the Mississippi and Ohio Rivers. It is one of the water carriers that have been demoralizing the rate situation on the Ohio and Mississippi Rivers on coffee, sugar, cotton, and other commodities. It has formally voiced its opposition to the regulation of its port-to-port rates. It insists it must be in a position to change its port-to-port rates from week to week, from day to day, from hour to hour, and from minute to minute as conditions in its judgment require. It makes what one of its own officers described as "confidential rates." It refuses to state what those rates are. It is in these days engaging in the very practices that gave rise to the Interstate Commerce Act, and it asks the Commission to protect and aid it in these practices. It asks the Commission to require the rail carriers to continue the all-rail rates on such a level as will drive the traffic from the rail routes to the water route of the American Barge Line Company. It insists that it must have differentials on its port-to-port traffic that greatly exceed the standard differential of 20 percent. The greater the differential the greater the opportunity the American Barge Line Company possesses of continuing its reprehensible practice of making what it terms as "confiden-

203 tial rates", rates which vary from day to day as between shipper and shipper, dependent upon nothing except the mere whim and caprice of the American Barge Line Company. What the American Barge Line Company seeks in substance is the destruction and ruin of the rail carriers. There cannot be any doubt about its purpose as exemplified in the practices that it is now pursuing and the principles that it so flagrantly advocates.

There is now pending before the Commission fourth section application no. 14734 of the Illinois Central Railroad Company and The Yazoo & Mississippi Valley Railroad Company, in which these carriers ask for fourth-section relief in respect to the rates on petroleum and petroleum products from shipping points in the New Orleans-Baton Rouge group to Memphis, Tennessee, Paducah, Owensboro, and Louisville, Kentucky. The hearing in this proceeding was held in New Orleans, Louisiana, on July 18–21, 1932. At that hearing Mr. A. P. Calhoun, vice president in charge of traffic of the American Barge Line Company, appeared and offered testimony in opposition to this application (trans. 273).

Mr. Calhoun stated on cross-examination (trans. 282–283) that the American Barge Line Company was moving oil from New Orleans to Pittsburgh, Pennsylvania, from Louisville to Ashland, from Parkersburg to Wierton, and to a great many other points, that these movements are covered by private contracts and not by published tariffs, that as the charges are contract charges he did not care to give them, that the American Barge Line Company operates its port-to-port business on the basis of such rates as it fixes from time to time, that it is in a position to charge and actually does
204 charge rates dependent upon particular conditions as they arise (trans. 286), and that the American Barge Line Company is asking the Commission through the power the Commission has to regulate rail rates, to protect the American Barge Line Company with respect to its unregulated traffic. He voiced his vigorous opposition to the regulation of the port-to-port traffic of the American Barge Line Company.

Mr. Calhoun went on to state in answer to further questions that the port-to-port rate on petroleum of the American Barge Line Company between Louisville and Memphis was a contract rate, that it had no relationship whatever to the rail rate, and that as the rate was a "confidential rate" he did not wish to name it.

The American Barge Line Company thus asks the Interstate Commerce Commission to regulate the all-rail rates of the rail carriers so as to require the maintenance of these rates upon a level that will divert all the traffic from the all-rail routes to the water route of the American Barge Line Company. The American Barge Line Company asks the Commission, in short, so to regulate the rates of the all-rail carriers as to destroy the very subject of regulation, the railroad system of the United States. That this is the aim and purpose of the American Barge Line Company is perfectly clear

from the practices that now characterize its operation, on the Ohio and Mississippi Rivers. But in view of these practices the east side lines submit that the Interstate Commerce Commission should be extremely reluctant, without a full hearing and without knowledge of all the surrounding facts and circumstances, to enter an order requiring the establishment of joint through routes and rates with the American Barge Line Company on cotton which are based
205 upon the very rates that were established to meet the competition of the American Barge Line Company and other unregulated agencies of transportation.

The testimony of Mr. Calhoun in the case just referred to shows that the American Barge Line Company makes no pretense of maintaining its port-to-port rates on the basis of the 20 percent standard differential. The higher the rail rate the greater of course becomes the barge differential when based upon the 20 percent basis, and the greater the standard differential becomes, the wider opportunity the American Barge Line Company has and the greater leaway it possesses in the establishment of its "confidential rates" on port-to-port traffic.

It is amazing that in this era and after some fifty years of regulation of railroad rates by the Interstate Commerce Commission, the American Barge Line Company should appear before the Commission, the tribunal that owes its very existence to the fact that prior to the time the Interstate Commerce Act was passed the rail carriers in this country were in a position to do precisely what the American Barge Line Company is now in a position to do—to change its rates overnight, to make rates for one shipper lower or higher than those that are made for another shipper on the same commodity moving from and to the same points, to change its rates from time to time dependent upon conditions as they arise, and to make its rates dependent upon the quantity offered, and should virtually ask
206 the Commission to protect the American Barge Line Company in a continuance of the very practices that gave rise to the enactment of the Interstate Commerce Act.

The Commission concluded on November 3, 1932, a hearing in I. & S. Docket No. 3814, Sugar from Gulf and South Atlantic Ports, involving the propriety of reduced rates on sugar proposed by the southern carriers from refining points in southern territory, including refining points in the New Orleans district. The sugar refineries in the New Orleans district are all located on the Mississippi River and are reached by the barge lines that operate on the Mississippi River, including the American Barge Line Company.

It was brought out at this hearing that although the all-rail rate on sugar from New Orleans to Evansville, Indiana, is at the present time 51 cents, and the water rate, based upon the standard differential of 20 percent, would be 40 cents, the American Barge Line Company on June 9, 1932, openly quoted a rate of 25 cents f.o.b. barge New Orleans to on-board cars or into a warehouse at Evansville, and a rate of 22 cents f.o.b. barge New Orleans to f.o.b. barge

Evansville. The American Barge Line Company, in other words, so far as the rate of 25 cents is concerned, was quoting a rate that was just about 50 percent of the all-rail rate. The American Barge Line Company quoted the same rates of 25 and 22 cents, respectively, from New Orleans to Louisville. The all-rail rate on sugar from New Orleans to Louisville at the present time is 54 cents.

The American Barge Line Company in a letter dated June 7, 1932, addressed to the president of the Mississippi Valley Barge Line Company, actually stated that there are certain commodities, comparatively few in number, which move in large
207 volume from port to port, that are bound to move at a rate materially lower than the 80 percent basis.

The foregoing will indicate to the Commission the character of the competition that the rail carriers in the Mississippi Valley and the southwest are now encountering from the American Barge Line Company. It is unfair, it is ruthless, it is destructive, and the rail carriers must look to the Commission for support and help against the operations of such a company as the American Barge Line Company. We recognize, of course, that the Commission lacks the power to regulate these common carriers on water as it regulates common carriers by rail, but the Commission has the power to determine to what extent through routes and joint rates between the rail and these water carriers will be reasonable, and to fix reasonable minimum differentials.

The American Barge Line Company is in a position to follow and does follow what has recently been described by the California Railroad Commission (investigation into the operation of the various transportation systems doing business in the State of California, decision dated October 10, 1932), as the "law of the jungle." The rail carriers are not permitted to follow that law. Their acts and their practices must conform to the standards laid down in the Interstate Commerce Act. But we do not believe that the Interstate Commerce Act leaves the rail carriers entirely helpless before the onslaughter of these unregulated lines. We do not believe that the Interstate Commerce Act is an effective weapon only in the hands of these unregulated lines or that it should be construed
208 as these barge lines contend it should be construed so as to bring about the destruction of the very subject of regulation. We believe that the Interstate Commerce Act still affords some measure of protection to the all-rail carriers in the situations that have recently developed, including the present one, which all have their origin in the practices that are now being pursued by these unregulated agencies of transportation.

The last side lines are of the deep conviction, when consideration is given to the character of the present rates on cotton, the circumstances that prompted their publication, the purposes which the carriers had in establishing them, and their level, that the law does not require the establishment of through routes and joint rates in connec-

tion with the American Barge Line Company on the basis of the present rates on cotton. In any event this should not be done in the absence of a hearing by which the Commission can fully inform itself respecting the facts, the necessity, if any, on the part of the American Barge Line Company for any differential under the present rates, the available traffic, the agencies of transportation by which that traffic is now being moved, the effect of a differential basis on the rail carriers, and all other pertinent facts and considerations.

The rail carriers, in an effort to save themselves from ruin itself, a ruin brought about by the policies that the American Barge Line Company is now pursuing and by the practices that it is following, last summer reduced the rates on cotton, a commodity that constitutes a substantial part of their tonnage, in an effort to place
209 their all-rail routes on more of an equality with the competing routes of unregulated carriers, including particularly the competing routes of the American Barge Line Company, and to give those all-rail routes an equality of opportunity with the competing routes of the unregulated carriers. These rates took effect on August 29, 1932. Prior to the time they took effect a hearing was held at Washington, D.C., before the Commission to determine whether these rates should be suspended, and, as pointed out by the southwestern lines in their reply (page 6) the conclusion of the Commission was that these rates seemingly afforded the carriers their only opportunity to meet the competitive situation with which they were confronted. The requests for suspension were denied.

Notwithstanding the circumstances under which these rates were published and the purpose of the carriers in publishing these rates, the American Barge Line Company now appears and has the temerity to ask the Commission, in the absence of a hearing, and without a full disclosure to the Commission of the surrounding facts and circumstances, and the effect upon the rail carriers of the proposals of the American Barge Line Company, to require the rail carriers to establish through routes and joint rates in connection with the American Barge Line Company that are predicated upon the rates that were reduced by the rail carriers for the purpose of meeting the competition engendered by the unfair and unjust practices of the American Barge Line Company. If the request of the American Barge Line Company is complied with the result will be to thwart the very purposes of the carriers in establishing these rates on
210 cotton, and to deny the carriers the opportunity which the Commission found they should have of establishing rates that will give the all-rail routes an equality of opportunity with competing water routes.

The unfairness and injustice to the rail carriers of this request is apparent, and the fact that the request comes from a company that indulges in such practices as characterizes the operations of the American Barge Line Company ought in and of itself to be sufficient to convince the Commission that the rail carriers are in any

event entitled to a hearing before a system and basis of through routes and joint rates with the American Barge Line Company is established that will result in further serious injury to the rail carriers and in a greater impairment of their revenues.

The American Barge Line Company has no moral and we believe no legal right to ask the Commission for differentials below the rates which the American Barge Line Company helped to create, and which the Commission permitted the rail carriers to establish to the end that the rail carriers might place the all-rail routes on more of an equality so far as the costs of transportation are concerned, with the water routes of the American Barge Line Company.

There is another factor that the Commission should bear in mind in considering these petitions of the American Barge Line Company, a factor which in the judgment of the East Side Lines is controlling. The water route of the American Barge Line Company from Memphis to Pittsburgh is not a practicable one for cotton from a service standpoint, and the East Side Lines are convinced that the transportation of cotton by the American Barge Line Company up the
211 Mississippi River and the Ohio River cannot under the circumstances possibly be any cheaper than the cost of transporting cotton via the all-rail routes. Before the Commission requires the establishment of a differential basis of joint through rates in connection with the American Barge Line Company, that company should be required to prove that the costs of transportation via the routes proposed by the American Barge Line Company are less than the costs via the all-rail routes.

As stated by the Commission in War Department vs. A. & S. Ry. Co., 77 I.C.C. 317 (p. 322), the port-to-port rates of the Federal Barge Line were established by the Railroad Administration upon the inauguration of water service and in all instances were made 80 percent of the corresponding rail rates with the exception of coal on the Warrior River. This differential basis has been adhered to by the Commission. It has had occasion to point out in one case that the record was admittedly lacking in any reliable evidence as to the cost of transportation (Inland Waterways Corporation vs. C. G. W. R.R. Co., 129 I.C.C. 521), while in another case it has had occasion to criticize the cost figures offered to support the 20 percent differential basis (Cotton and Cotton Linters, 183 I.C.C. 33).

In a recent decision of the Commission, Inland Waterways Corporation vs. A. G. S. R.R. Co., et al., 151 I.C.C. 126, the Commission said (p. 144):

"The barge-line differentials are based upon the premise that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost."

212 The Interstate Commerce Commission ought not in these days and under the conditions now existing to require the rail

carriers to join in through routes and joint rates with a water carrier which are less than the all-rail rates, in the absence of clear and convincing proof by the water carrier that the cost of transporting the traffic in connection with the route of the water carrier is less than the cost of transporting the traffic via the all-rail route. Obviously, this is a question that can only be determined after a hearing.

The east side lines therefore submit that they should not be required to enter into through routes and joint rates with the American Barge Line Company as prayed for in the petitions herein in the absence of a showing by the American Barge Line Company given in a formal hearing that the cost of transporting cotton via the proposed routes is less than the cost of transporting cotton via the all-rail routes. The present basis of differentials is wholly an arbitrary one and not based on either fact or experience.

The Commission in Luckenbach Steamship Co. vs. Southern Railway Co. Et Al., 157 I.C.C. 752, said, among other things, (p. 760):

"Complainant, acting as a free lance in the transportation world, refuses to place itself in a position wherein its rates and charges might become subject to regulation by this Commission, and yet seeks to invoke our aid in assisting it to divert from carriers subject to the Act, and whose rates and charges are subject to regulation by us, certain traffic which the rail carriers now enjoy, on the plea that the situation, competitive or otherwise, does not justify the conduct of the rail carriers here complained of whose lines are used to complete the transportation of traffic brought into the ports by the complainant's boat lines and destined to points beyond via rail. * * *"

213 Much of what is here said applies to the American Barge Line Company. If there ever was a free lance in the transportation world the experience of the carriers in the Mississippi Valley shows that the American Barge Line Company is one. It objects to any regulation of its port-to-port rates. It in effect laughs at the 20 percent differential basis, and makes whatever rates and differentials it chooses. Then with an about face it asks the Commission to aid it in a continuation of its practices, practices that are abhorrent to every word and line of the Interstate Commerce Act. The American Barge Line Company does not deserve the aid of the Commission with respect to the prayer of its petitions. The law does not under the circumstances require the granting of that aid or a compliance with the prayer of these petitions. The rail carriers, having been permitted, following the hearing before the Commission, to reduce the rates on cotton in order to meet the competition of the American Barge Line Company and other unregulated agencies of transportation, and to give the all-rail routes an equally of opportunity with the water routes, ought not now reasonably to be required to establish differential rates with the American Barge Line Company that are based on the very rates which the practices

of the American Barge Line Company helped to create. In any event the Commission should not consider the establishment of through routes and joint rates as requested in the petitions of
214 the American Barge Line Company, until there has been a hearing with respect to these petitions and all parties in interest have had an opportunity of being heard.

Respectfully submitted.

W. A. McGEHEE,
W. A. NORTHCUTT,
M. G. ROBERTS,
ELMER A. SMITH,
Attorneys for Respondents.
#135 East Eleventh Place, Chicago, Illinois.

NOVEMBER 14, 1932.

215 [Plaintiff's exhibit "E" omitted. See exhibit "A", printed side page, 5 ante.]

219 *Plaintiff's exhibit "F"*

Interstate Commerce Commission, Washington

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of petition of southwestern rail carriers for postponement of effective date of orders, filed January 9, 1933, in ex parte no. 102, application of American Barge Line Company, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 12th day of January A.D. 1933.

[SEAL.]

(Sgd.) GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

220 Before the Interstate Commerce Commission. Ex Parte No. 102. Application of American Barge Line Company

Petition of southwestern rail carriers for postponement of effective date of orders.

R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, E. A. Smith, C. S. Burg, M. G. Roberts, B. F. Batts, J. L. Stewart, Robt. Thompson, H. H. Larimore, Geo. W. Holmes, Attorneys for Southwestern Carriers, 2008 Mo. Pac. Bldg., St. Louis, Missouri.

January 7, 1933.

221 Before the Interstate Commerce Commission. Ex Parte No. 102. Application of American Barge Line Company

Petition of southwestern rail carriers for postponement of effective date of orders.

Come now the southwestern carriers by railroad and show that they have filed with the Commission their certain petition dated December 30, 1932, praying vacation of orders of Commission of date December 10, 1932, entered in the above-entitled proceeding, together with reopening, consideration by the entire Commission, hearing, and dismissal of petitions, which said petition is before the Commission undisposed of. Said southwestern lines also show to the Commission that said orders of December 10, 1932, entered in the above-entitled proceeding, are effective February 6, 1933, on ten days' notice to the Commission and to the public.

In view of the foregoing, the Commission may not be able to give full consideration to the petition of such southwestern
222 lines heretofore referred to and filed with the Commission praying vacation of orders of December 10, 1932, together with reopening, consideration of the proceeding by the entire Commission, including a hearing, and followed by a dismissal of the petitions upon which said orders are based.

Petitioners, therefore, request that the effective date of the orders of the Commission entered December 10, 1932, be further postponed to April 6, 1933.

Respectfully submitted.

R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, E. A. Smith, C. S. Burg, M. G. Roberts, B. F. Batts, J. L. Stewart, Robt. Thompson, H. H. Larimore, Geo. W. Holmes, Attorneys for Southwestern Carriers.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each party.

Dated at St. Louis, Mo., this 7th day of January 1933.

H. H. LARIMORE.

2008 Mo. Pac. Bldg., St. Louis, Mo.
January 7, 1933.

223 *Plaintiff's Exhibit "G"*

Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of petition of southwestern rail carriers for vacation of order, reopening, consideration by the entire Commission, hearing, and dismissal of petitions, filed January 9, 1933, in Ex Parte No. 102, Application of American Barge Line Company, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 12th day of January, A.D. 1933.

[SEAL.] (Sgd.) GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

224 Before the Interstate Commerce Commission. Ex Parte No. 102. Application of American Barge Line Company

Petition of southwestern rail carriers for vacation of order, reopening, consideration by the entire commission, hearing, and dismissal of petitions.

R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, C. S. Burg, M. G. Roberts, B. F. Batts, J. L. Stewart, Robt. Thompson, H. H. Larimore, Geo. W. Holmes, Attorneys for Southwestern Carriers, 2008 Mo. Pac. Bldg., St. Louis, Missouri.

December 30, 1932.

225 Before the Interstate Commerce Commission. Ex Parte No. 102. Application of American Barge Line Company

Petition of southwestern rail carriers for vacation of order, reopening, consideration by the entire Commission, hearing, and dismissals of petition.

Come now The Atchison, Topeka and Santa Fe Railway Company, The Chicago, Rock Island and Pacific Railway Company, The Kansas City Southern Railway Company, Louisiana & Arkansas Railway Company, St. Louis-San Francisco Railway Company, J. M. Kurn and John G. Lonsdale, receivers of railroads and properties of St. Louis-San Francisco Railway Company, St. Louis Southwestern Railway Company, Texas and New Orleans Railroad Company, The Texas and Pacific Railway Company, and Missouri Pacific Railroad Company, hereinafter referred to as Southwestern carriers, for themselves and other common carriers by railroad similarly sit-
226 uated, and show that Division 4 of the Interstate Commerce Commission on December 10, 1932, filed the second supplemental report of the Commission in this proceeding and entered the following order:

Order

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D.C., on the 10th day of December, A.D. 1932. Ex Parte No. 102. Application of American Barge Line Company

Upon further consideration of the matters and things involved in the above-entitled proceeding

It is ordered, That the second ordering paragraph of the order of March 11, 1932, in said proceeding be, and it is hereby, amended to read as follows:

It is further ordered, That, except as provided in the next succeeding paragraph hereof, said common carriers by rail, parties to the through routes prescribed in the next preceding paragraph hereof, be, and they are hereby, directed and required to join with

said American Barge Line Company in establishing, on or before September 19, 1932, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, joint rates applicable over said through routes, constructed by deducting from the lowest all-rail rate contemporaneously applicable on corresponding traffic over any route between the same points of origin and destination the following differentials: (a) Where over barge-rail routes the shortest all-rail distance via the lines of the connecting rail carriers from point of origin to point of destination through the port of interchange does not exceed the shortest rail distance between such points of origin and destination by more than 20 percent, where over barge-rail routes the shortest all-rail distance between the inland point of origin or destination and the port of interchange does not exceed two thirds of the shortest all-rail distance, where over rail-barge-rail routes the shortest all-rail distance from point of origin to point of destination through the port of interchange does not exceed by more than 20 percent the shortest rail distance between such points of origin and destination, and where over rail-barge-rail routes the total rail haul is not more than one half of the shortest all-rail distance between points of origin and destination, 20 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by said American Barge Line Company; and (b) in all other cases, 10 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by said American Barge Line Company; Provided, however, That no such joint commodity rate need be established where the corresponding all-rail rate over the direct route from or to an interior point to or from a port of destination or origin involves at intermediate points departures from the long-and-short-haul provision of the fourth section of the Interstate Commerce Act, nor if said American Barge Line Company and the interested rail carriers agree that no such joint commodity rate shall be established; and Provided, further, That no joint barge-rail or rail-barge-rail rate established under this order from or to any given point of origin or destination need be lower than the corresponding all-rail rate between such point of origin or destination and the port of interchange.

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228 It is further ordered, That said order be, and it is hereby, further amended by inserting the following paragraph between the second and third ordering paragraphs thereof:

It is further ordered, That said common carriers by rail, parties to the through routes hereinbefore prescribed, be, and they are hereby, directed and required to join with said American Barge Line Company in establishing on or before January 25, 1933, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, joint rates on cotton in carloads, minimum

37,500 pounds, over barge-rail routes hereinbefore prescribed from Memphis, Tenn., to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, constructed by deducting from the corresponding all-rail rate the differential of 6 cents per 100 pounds, and rail-barge-rail rates from points Arkansas to the same destinations over rail-barge-rail routes hereinbefore prescribed, subject to the minimum weights shown below and constructed by deducting from the corresponding all-rail rates the following differentials: 8 cents, minimum 25,000–40,000 pounds; 6 cents, minimum 35,000–55,000 pounds; 4 cents, minimum 50,000–80,000 pounds.

And it is further ordered, That in all other respects said order, as amended, shall continue in effect until the further order of the Commission.

By the commission, division 4.

[SEAL] GEORGE B. MCGINTY,
Secretary.

229 In such supplemental report and order the Commission prescribed barge-rail and rail-barge-rail rates on cotton, in carloads, from certain points in Arkansas and Memphis, Tennessee, to eastern territory and New England, which said rates were prescribed in response to petitions filed with the Commission by the American Barge Line Company, and in which rates these petitioners are required to participate.

Your petitioners show that by petition dated November 12, 1932, and filed with the Commission on November 14, 1932, they requested a hearing upon said petitions filed by the American Barge Line Company and prayed the Commission to set down such petitions for hearing, to the end that your petitioners might appear at such hearing, offer testimony, and controvert the alleged facts set up by the American Barge Line Company in its said petitions.

The Commission, however, did not set down such petitions of the American Barge Line Company for hearing, and did not afford these petitioners a hearing or opportunity for hearing as to such petitions.

By reason of the fact that these petitioners were deprived of a hearing in connection with said petitions of American Barge Line Company, the second supplemental report of the Commission
230 and the orders entered in connection therewith of date December 10, 1932, and filed and entered in this proceeding, are unlawful and beyond the power, authority, and the jurisdiction of the Commission to make.

Petitioners, therefore, pray that the second supplemental report of the Commission entered in this proceeding and all orders entered in this proceeding of date December 10, 1932, be vacated and set aside; that this proceeding be reopened, considered, and determined by the entire Interstate Commerce Commission; that in connection with such consideration and determination of all matters and things connected with this proceeding by the entire Commission, a full and com-

plete hearing, after reasonable notice, be afforded your petitioners and all carriers by rail in anywise involved herein; that petitioners and all carriers by rail interested in this proceeding be permitted to appear before the Commission and offer testimony in opposition to the granting of the said petitions of American Barge Line Company herein referred to, and that such petitions of the American Barge Line Company be dismissed.

In support of this petition these petitioners refer to their petition of date November 12, 1932, and hereinbefore filed with the Commission, and ask that such petition be considered the same as if it
231 were fully incorporated herein.

Respectfully submitted.

R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, C. S. Burg, M. G. Roberts, B. F. Batts, J. L. Stewart, Robt. Thompson, H. H. Larimore, Geo. W. Holmes, Attorneys for Southwestern Carriers.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each party.

Dated at St. Louis, Mo., this 6th day of January 1933.

H. H. LARIMORE.

2008 Mo. Pac. Bldg., St. Louis, Mo.
December 30, 1932.

232–233 [Plaintiff's exhibit "H" omitted. See exhibit "C", printed side page, 24 ante.]

234 [Plaintiff's exhibit "I" omitted. See exhibit "B", printed side page, 23 ante.]

235–236 [Plaintiff's exhibit "J" omitted. See exhibit "A", printed side page, 22 ante.]

237 [Omitted in printing.]

238 In United States District Court

[Title omitted.]

Stipulation as to hearing

Filed April 14, 1933

It is stipulated and agreed by and between counsel for the respective parties that the hearing on plaintiffs' motion for preliminary injunction shall be considered by the court as a final hearing on the merits, that no further evidence shall be taken or introduced by either the plaintiffs, the original defendants, or any intervening defendant,

and that a final decree shall be entered by the court on the pleadings and record now before the court.

(Sgd.) E. Ennalls Berl, (Sgd.) H. H. Larimore, (Sgd.) R. S. Outlaw; Solicitors for Plaintiffs; (Sgd.) Elmer B. Collins, Special Assistant to the Attorney General, of Counsel for United States of America, defendant; (Sgd.) H. L. Underwood, Of counsel for Interstate Commerce Commission, defendant; (Sgd.) John J. Esch, (Sgd.) A. K. Shipe, Of counsel for American Barge Line Company, Mississippi Valley Barge Line, and Mississippi Valley Association, intervening defendants; (Sgd.) Clark C. Wren, Of counsel for Inland Waterways Corporation, intervening defendant.

[File indorsement omitted.]

239 In United States District Court for the District of Delaware

In equity no. 1012

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Before THOMPSON, Circuit Judge, and DICKINSON and NIELDS, district Judges

Findings of fact, conclusions of law, and opinion

Filed June 14, 1933

THOMPSON, Circuit Judge.

Findings of fact

1. Plaintiffs herein are common carriers by railroad subject to the Interstate Commerce Act, and engage in the transportation of cotton from points of origin in the State of Arkansas and from Memphis, Tennessee, to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

2. On August 29, 1932, plaintiffs and other railroad carriers, because of severe competition from unregulated truck and water carriers, established carload rates upon cotton from points of origin in the State of Arkansas and from Memphis, Tennessee, to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, upon a basis substantially and materially lower than the any-quantity rates theretofore
240 prevailing, and on November 16, 1932, plaintiffs and other railroad carriers further reduced said carload rates in the belief

that such further reduction was necessary to meet the competition above referred to.

3. By petitions dated October 31, 1932, and November 5, 1932, the American Barge Line Company applied to the Commission to enter an order requiring the railroads participating in the said carload cotton rates to participate with it in joint through rail-barge-rail and barge-rail carload rates from the same origins to the same destinations upon a basis lower than the all-rail carload rates. The natural and normal effect of such participation in through routes and rates with the American Barge Line Company would be to divert cotton, in carloads, from the all-rail routes previously established to the lower rail-barge-rail and barge-rail routes.

4. By petitions dated November 12, 1932, and November 14, 1932, the carriers operating both east and west of the Mississippi River, including plaintiffs in this action, prayed the Commission to set down for hearing the said applications of the American Barge Line Company, and represented to the Commission in their said petitions that without a full and fair hearing, after reasonable notice, at which hearing carriers by railroad, including plaintiffs, shippers, and other parties in interest, and representatives of the American Barge Line Company, should be permitted to appear and offer testimony and examine and cross-examine witnesses offered by all parties in any respect interested therein, the Commission could not properly and justly determine the issues presented by such applications. The carriers by railroad further averred specifically that without such hearing the Commission would be without proper evidence to determine—

241 a. Whether carriers by railroad, including certain of these plaintiffs, should be required to join with the American Barge Line Company in establishing through rail-barge-rail rates and through barge-rail rates on cotton, in carloads, from Arkansas and Memphis, Tennessee, to the destination territory heretofore described;

b. Whether such through rail-barge-rail rate and barge-rail rates, or either of them, should be lower or the same as the through all-rail rates then in effect;

c. What through routes, if any, should be required;

d. What rail-barge-rail routes and barge-rail routes, if any, should be established; and

e. What differential, if any, should be maintained for the water-rail routes under the all-rail routes.

5. In neither the petitions of the American Barge Line Company, dated October 31, 1932, and November 5, 1932, nor in the petitions or replies of the carriers dated November 12, 1932, and November 14, 1932, are there set forth any facts or evidence necessary to a determination by the Commission of the issues presented by the applications of the American Barge Line Company. The petitions of the American Barge Line Company substantially set forth solely the ultimate conclusion that the establishment of rail and water rates there requested was desirable and in the public interest, and the peti-

tions or replies of the carriers set forth in substance only a denial of such ultimate conclusion and a prayer for a hearing.

6. The Interstate Commerce Commission declined to grant to the railroad carriers a hearing as prayed in their petitions of November 12, 1932, and November 14, 1932, and without such hearing, on December 10, 1932, entered its said second supplemental report and order in Ex Parte 102, Application of American Barge Line
242 Company, in which plaintiffs and certain other carriers by railroad named therein were required to join with the American Barge Line Company in establishing, on or before January 25, 1933, upon fifteen days' notice, joint rail-barge-rail rates on cotton, in carloads, from the origin territory to the destination territory above described, upon a basis 8, 6, and 4 cents lower than the all-rail rates between the same points, dependent upon the application of varying minimum weights.

7. The said second supplemental order of the Commission was made without evidence to support it, and there is no record before the Commission which may be examined by a court if called upon to determine the legality or validity of the Commission's order.

8. By petitions dated December 30, 1932, and January 7, 1933, the southwestern carriers by railroad, plaintiffs herein, on their own behalf and on behalf of other carriers by railroad similarly situated, requested the Commission to vacate and set aside the said second supplemental order of December 10, 1932; to grant a reconsideration of all matters by the entire Commission; in connection with such reconsideration to afford said railroads a hearing prior to the effective date of any order; and to extend the effective date of said second supplemental order of December 10, 1932, in order to afford the Commission an opportunity to pass upon said petitions. The said petitions above referred to were denied by the Commission in its order of January 18, 1933.

9. By appropriate orders of the Commission the said second supplemental order of the Commission of December 10, 1932, has been extended to become effective June 1, 1933, upon ten days' notice to the public.

243 10. The said second supplemental order of the Commission will require the railroads serving the origin and destination territories involved to participate in joint through rail-barge-rail and barge-rail rates from points of origin in Arkansas and Memphis, Tennessee, to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, upon a basis 4, 6, and 8 cents lower than the corresponding all-rail rates between the same points, and to observe such rail-barge-rail and barge-rail rates so constructed as a maximum rate as long as plaintiffs maintain all-rail carload rates on cotton between the same points of origin and destination heretofore referred to.

11. The said second supplemental order of the Commission of date December 10, 1932, if made effective, will require carriers by railroad whose lines serve the State of Arkansas to participate in

joint rail-barge-rail rates on cotton, in carloads, from Arkansas to the destination territory heretofore described, substantially lower than contemporaneously in effect via the all-rail routes in which such carriers now participate. In addition, such order will require carriers by railroad whose lines extend from Arkansas points to the St. Louis gateway to deliver cotton to the barge line at Memphis, Tennessee, for transportation by water to Pittsburgh, Pennsylvania, in many instances short-hauling such carriers and depriving them of the full use of their lines of railroad.

12. Such carriers would, in the event the cotton is delivered to the barge line at Memphis, Tennessee, receive less revenue than if such cotton were transported over all-rail routes to the St. Louis gateway and there delivered to eastern rail connections.

13. Carriers by railroad, plaintiffs in this action, who operate lines of railroad extending from the St. Louis gateway to the destination territory heretofore described, would, as to cotton moving rail-barge-rail, if the order of the Commission referred to becomes effective, take such cotton at Pittsburgh, Pennsylvania, instead of St. Louis, and would thereby be deprived of the use of their lines of railroad extending from the St. Louis gateway to Pittsburgh, Pennsylvania, and would receive less revenue than such carriers would receive if they enjoyed an all-rail haul from the St. Louis gateway to the destination territory involved under the all-rail rates now in effect.

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14. Carriers by railroad serving Memphis, Tennessee, with lines of railroad located west of Pittsburgh, as to cotton moving barge-rail, would be deprived of participation in the transportation of cotton, in carloads, moving from points in Arkansas and from Memphis, Tennessee, to the destination territory before set out. Lines of railroad operated by carriers extending eastward from Pittsburgh, Pennsylvania, to the destination territory involved, would be required to participate in rail-barge-rail rates from points in Arkansas, and barge-rail rates from Memphis, Tennessee, lower than now in effect via all-rail routes in which such carriers participate.

15. If the said second supplemental order of the Commission becomes effective, plaintiffs will be unable to recoup in any manner any losses which they will sustain thereby and the damage done them will therefore be irreparable.

CONCLUSIONS OF LAW

1. The statute here involved, Section 3 (e) of the Inland Waterways Corporation Act, as amended, U.S. Code, Tit. 49, c. 5, Section 153 (e), properly construed, requires the establishment by the Interstate Commerce Commission of through routes, joint rates, and differentials without a hearing in advance and the order of the Commission here attacked was made in pursuance of the express terms of the statute and not in disregard thereof.

245

2. Section 3 (e) of the Inland Waterways Corporation Act, as amended, vests in the Interstate Commerce Commission the power to require carriers by rail to participate in rail and water routes without opportunity to be heard before the entry of such an order or the effective date thereof to determine—

a. Whether carriers by railroad, including certain of these plaintiffs, should be required to join with the American Barge Line Company in establishing through rail-barge-rail rates and through barge-rail rates on cotton, in carloads, from Arkansas and Memphis, Tennessee, to the destination territory heretofore described;

b. Whether such through rail-barge-rail rates and barge-rail rates, or either of them, should be lower or the same as the through all-rail rates then in effect;

c. What through routes, if any, should be required;

d. What rail-barge-rail routes and barge-rail routes, if any, should be established; and

e. What differential, if any, should be maintained for the water-rail routes under the all-rail routes.

3. The second supplemental order of the Commission is void because made without evidence to support it.

4. The second supplemental order of the Commission is an affirmative and final order of the Interstate Commerce Commission which plaintiffs must comply with by a certain date or incur the penalties provided for by statute, and is such an order as may be reviewed by the courts pursuant to Section 41, paragraph 28, and Sections 43, 44, 45, 46, and 47 of title 28, United States Code Annotated.

246 5. Section 3 (e) of the Inland Waterways Corporation Act, as amended, authorizes the entry of an order and compliance therewith without hearing, denies the parties the right to the judicial review of such order referred to in paragraph 4 hereof, and is arbitrary and unreasonable and therefore in violation of the Fifth Amendment to the Constitution of the United States.

6. Section 3 (e) authorizes the Commission to establish joint rail and water rates without hearing or evidence, and constitutes a delegation of pure legislative power contrary to the provisions of article I, sec. 1, of the Constitution.

7. The constitutional right of plaintiffs to a full and fair hearing before the entry of an order against them and compliance therewith, is not complied with by provision for any subsequent hearing.

8. The constitutional right of plaintiffs to a full and fair hearing before the entry of an order against them and compliance therewith, is not affected by the fact that the Commission in some subsequent proceeding may change or alter its former order after hearing. If plaintiffs be required to comply with any such order for any period whatsoever without prior hearing their constitutional rights are invaded, and due process of law is denied them.

9. The action of the Commission in denying plaintiffs' petitions for a hearing, and in requiring the joint rail and water rates to

become effective without such hearing, denied to the carriers a hearing or opportunity to be heard and constitute a denial of due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

247 OPINION

This suit was brought under the provisions of the District Court Jurisdiction Act, 38 Stat. 219 (28 U.S.C.A., sec. 41, subd. 28), to set aside an order of the Interstate Commerce Commission and, pending final decree, to secure a preliminary injunction. The plaintiffs are common carriers by rail. The American Barge Line Company is a common carrier by water, and operates barges on the Ohio and Mississippi Rivers between Pittsburgh and New Orleans. The Barge Company had on several occasions sought and obtained from the Commission, in accordance with the provisions of the amended Inland Waterways Corporation Act (49 U.S.C.A., sup. 153 e), certificates of public convenience and necessity which authorized it to operate on the named rivers. The Commission ordered the plaintiff railroad carriers to establish through barge-rail rates and they complied with those orders. At the time of the entry of the orders, the railroads were operating under normal rates. Subsequently the plaintiffs and other carriers by railroad established so-called carload rates upon cotton from points in Arkansas and Memphis, Tennessee, to points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut. Those rates were lower than the any-quantity rates on cotton then prevailing and were designed to assist the railroads to meet competition from unregulated truck and water carriers. Following the establishment of these depressed rates, the Barge Company petitioned the Commission to order the railroad carriers to establish through rail-barge-rail rates on cotton in carload lots for the territory already described. The railroad carriers petitioned the Commission for a hearing on the application of the Barge Company. This hearing was denied.

248 The Commission entered its second supplemental report and order in which it directed the plaintiffs to participate with the Barge Company in joint through rail-barge-rail and barge-rail rates on cotton in carloads, in the named territory, upon a basis of 8, 6, and 4 cents lower than the all-rail rates between the same points. The plaintiffs' petitions requesting the Commission to vacate and set aside this second supplemental order and to grant them a hearing, were denied. The effective date of the order has been extended to June 1, 1933. All parties have agreed by stipulation filed that the court may enter a final decree on the pleadings and record now before it.

The question in controversy is whether the Commission was in error in refusing a hearing upon the plaintiffs' petition prior to entering the second supplemental order. The plaintiffs argue that the Commission misconstrued the wording and the intent of the

amended Inland Waterways Corporation Act, supra. They further contend that, if the Commission was justified in its interpretation of the act, the act is unconstitutional in that it deprives the plaintiffs of property without due process of law in contravention of the Fifth Amendment to the Constitution, and constitutes a delegation of legislative power in violation of the provisions of Article I, sec. 1, of the Constitution.

Section 3 (e) (49 U.S.C.A., supp. 153 e) of the act is as follows:

"Any person, firm, or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of this title, and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of this title, and the Commission shall, in such
249 order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the Commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the Commission or by agreement of the water carriers and the other participating carriers. The Commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of publication the Commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The Commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the Commission; or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the Commission under the provisions of this section; and after full hearings the Commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the Commission shall give the hearing and decision of such questions preference over

all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible: * * *."

The language of the act is unambiguous. There is no requirement that a hearing be had prior to the order establishing through routes and joint rates. The provision for a hearing appears later in that portion of the section wherein the Commission is given authority to enter upon a hearing concerning the reasonableness or lawfulness of any through route or joint rate already filed in obedience to its order. Soon after the passage of the amendment to the Inland Waterways Corporation Act, the Commission secured the views of interested parties with respect to the meaning and purpose of the section in dispute and with respect to the procedure which
250 it should follow, particularly with reference to the extent to which public hearings are required. The Commission concluded, at that time, that a hearing was not provided for nor required prior to the issuance of orders directing or prescribing through routes and joint rates. Its analysis of the provisions of the section is reported in Procedure under Barge Line Act, 148 I.C.C. 129.

A study of the situation which preceded the enactment of the Inland Waterways Corporation Act and of the amendment thereto discloses that Congress intended to foster transportation by water wherever possible. In House Report No. 1537, House of Rep., 71st Cong., 1st sess., appears the following statement:

"This policy of opposition on the part of many of the railroads has resulted in years of delay in the extension of the benefits of water transportation to interior communities and has seriously retarded the successful operation of the Inland Waterways Corporation. Unless such opposition on the part of the rail carriers is overcome and through routes, joint rates, and an equitable division of joint rates is made available without interminable delays and the heavy expenses necessary to carry on such proceedings before the Interstate Commerce Commission, privately owned transportation service will never be realized on the inland waterways of the country.

"The hearings on this bill convinced the committee that legislation somewhat drastic is now not only needed but is necessary in order to fully carry out the purposes for creating the Inland Waterways Corporation, and to realize the benefits of the policy of Congress manifested by the large expenditures made for the improvement of our inland waterways.

"Paragraph (e) of the bill was carefully prepared to accomplish this purpose. If enacted into law, it is believed by the committee that it will immediately result in overcoming the reluctance of many of the railroads to cooperate with the Inland Waterways Corporation, and will aid in bringing about such through routes, joint rates, and fair division of joint rates as will afford to the people of a large part of the country the economies of cheaper transportation by water.

"This paragraph of the bill authorizes the Commission to direct connecting common carriers to join with the water carriers in through routes and joint rates, and to fix reasonable minimum differentials between all rail rates and joint rail and water rates; and it further authorizes the Commission to require the rail and water carrier
251 to enter into negotiations for the purpose of establishing equitable divisions of joint rates within 30 days after such joint rates are established. If they fail to so agree upon equitable divisions within 120 days, the Commission shall itself determine and establish reasonable divisions of such rates. Provision is made for any carrier who feels aggrieved by such action of the Commission to make complaint and have a full hearing under short proceedings, and the Commission is authorized to give the hearing and decision of such question preference over all other questions pending before it, except such questions as are given like preference by law. All carriers are thus given their day in court."

Since it is our view that the Commission did not misconstrue the act nor exceed the powers the Congress intended to confer upon it, the question is whether the act, so construed, is constitutional.

The second supplemental order, of which complaint is made, was unquestionably and admittedly made by the Commission without according the plaintiffs an opportunity to submit evidence or examine and cross-examine witnesses. Many authorities may be cited holding that an order establishing rates without hearing the public-service corporations affected thereby violates the guarantee of the Fifth Amendment of the Constitution. Cases cited by the plaintiffs, such as Interstate Commerce Commission v. Louisville & Nashville Railroad Co., 227 U.S. 88; New York & Queens Gas Co. v. McCall, 245 U.S. 345; and Manufacturers Railway Co. v. United States, 246 U.S. 457, although they involve statutes which provide for a public hearing, sustain the general principle that in the exercise of the rate-making power by administrative bodies, a hearing must be accorded the parties affected in order to afford due process of law. The same constitutional question, from a somewhat different viewpoint, is raised by the plaintiffs when they assert that, since the Commission made the order complained of without legal evidence to support it, the order is necessarily void. See United States v. Abilene &
252 Southern Railway Co., 265 U.S. 274. The necessity for a hearing when the Commission exercises its rate-making power over public-service corporations is pointed out by Mr. Justice Cardozo in Norwegian Nitrogen Products v. United States, decided February 6, 1933. In Atchison, Topeka & Santa Fe Railway Co. v. United States, 284 U.S. 248, it was held that a fair hearing is a fundamental requirement in the discharge by the Commission of its duty of determining reasonable rates.

We are forced to the conclusion that the attempted delegation by Congress of its power to establish rates without a public hearing is unconsttutional. The Supreme Court in Hampton & Co. v. United States, 276 U.S. 394, said:

"Again, one of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a commission, as it does, called the Interstate Commerce Commission, to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down, that rates shall be just and reasonable considering the service given, and not discriminatory. As said by this Court in Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 214, 'The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress.'"

While it is well settled that Congress may delegate to the Interstate Commerce Commission, as an administrative tribunal, the power to fix rates, provided they are just and reasonable, that result can be lawfully accomplished by the Commission only after a fair and full hearing of the carriers affected.

A final decree may be entered in accordance with this opinion, and a permanent injunction issued setting aside, annulling, and suspending the order of the Commission.

253 In United States District Court

[Title omitted.]

Concurring opinion

Filed June 14, 1933

NIELDS, D. J., concurring.

I concur in the result reached by Judge Thompson that section 3 (e) of the amendment to the Inland Waterways Corporation Act, known as the Denison Act, violates the fifth amendment to the Constitution of the United States and, consequently, that the second supplemental order of the Interstate Commerce Commission, here complained of, is void.

In my opinion, the deprivation of property that plaintiffs will suffer is not "short hauling" over their all-rail routes. That loss might well be the result of wholesome water competition. But the second supplemental order of the Commission directs the plaintiffs to participate with the American Barge Line Company in
254 joint through rail-barge-rail and barge-rail rates on cotton

in carloads upon a basis of 8, 6, and 4 cents lower than the all-rail rates between designated points. This is nothing less than rate-making in which plaintiffs are forcibly required to participate. The order is directed against plaintiffs "limiting their powers in the transaction of their business" and is a deprivation of property within the fifth amendment. Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 318.

The due process or hearing guaranteed by that amendment is not afforded in the Dennison Act and cannot be imported into the text of the act. It is true that the Commission may only "fix reasonable minimum differentials between all-rail rates and joint rates in connection with said water service" * * * and may only establish "equitable divisions" of the joint differential rates. If it were sought to imply a hearing before order from this language, the implication is negatived by the express provision of the act for a hearing of complaints after order filed.

The hearing by the Commission after the filing of its order is a hearing after deprivation of property and is not the hearing guaranteed by the Constitution. It may well be where the administration of the taxing power has been delegated to a commission public necessity requires that due process be afforded after the imposition or even after the payment of the tax. Hagar v. Reclamation District No. 108, 111 U.S. 701. Standard Oil Co. of California v. McLaughlin, 55 F. (2d) 274, 277. No such public exigency exists where, as here, the purpose of the act is "to promote, en-
255 courage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." 49 U.S.C.A. § 142; 41 Stat. 499.

256 In United States District Court

[Title omitted.]

Dissenting opinion

Filed June 14, 1933

DICKINSON, D. J., dissenting.

Except for one underlying thought, we would be able to follow the majority opinion to its conclusion. No being in accord with this underlying thought, we must dissent.

The thought is that railroad carriers have a property right in the prospective traffic which might or would (except for some complained of act of another) pass by their lines. This is the same claim of property right which the ox-team and pack-horse asserted against steam transportation, the stage coach against the trolley, and which now in turn the railroads are asserting against the

257 gas engine, motor truck, and bus. It may be that all of them will in the near future combine in the attempt to enforce such a right against air carriers.

It is unnecessary to inquire into the validity of such a claim of right because the complainants have expressly disclaimed it and the majority opinion does not avow it. It seems to us, however, that it underlies the ruling made because this is based upon the unconstitutionality of the act of Congress, under authority of which the Commission acted in making the order, the enforcement of which is enjoined, and the unconstitutionality consists in that the order deprives the complainants of property without due process, &c. The logic of the situation is that if they have a property right they should have protection, but if they have no property right they have no legal or equitable right of complaint. The property interest of a carrier in compensation for the carriage of traffic committed to it is undoubted. Whether it has a like property right in prospective traffic is another question. The sole question here is the existence of the latter right.

An outline and very general statement of the fact situation, it seems to us, makes this clear. There is a traffic between the Atlantic and Pacific coasts. There are established railroad line carriers which have been taking care of this traffic and will, if permitted, continue to do so. This traffic, or a part of it, may be visualized as carried by existing railroads from the Pacific coast to the Mississippi River where the Ohio empties into it. If we then think of the 258 traffic as transported northwardly by one line of railroad to its junction with the Pennsylvania Railroad and over it eastwardly through Pittsburgh to the Atlantic coast, we have a sufficiently general idea of the pre-order situation. The Ohio River extends from its junction with the Mississippi northeastwardly to and beyond Pittsburgh and is navigable at least to Pittsburgh. If we think of the line of the first railroad we have mentioned and of the Pennsylvania Railroad as forming the legs of a right-angle triangle, the Ohio River would be the hypothenuse. A barge line water route has been established on the Ohio River. Anyone can foresee that if the all-rail route from coast to coast traffic is diverted to a rail-and-water route to Pittsburgh and a rail route to the Atlantic, the railroad first mentioned may lose all of this through traffic and the Pennsylvania that part of it formerly carried by the first-mentioned railroad except only as the Pennsylvania would continue to carry it east from Pittsburgh.

The situation of the railroads mentioned is typical of all and shows the real nature of the damnum of which complaint is made and that it relates to what we have called prospective traffic. The damnum is unquestioned and is not merely speculative but actual. The sole question is whether there is likewise an injuria. If, as before stated, the complainants have a property right in this prospective traffic which they will lose they have suffered not merely a loss but a legal injury.

Inasmuch, however, as it is conceded that no such right
259 exists, we are unable to see how the decree in question can deprive the complainants of property which has no existence. If we were dealing with a statute which gave the right to a hearing before a preliminary order could be made, we would concede that the question of a property right did not arise. The statute, however, is, and we think correctly, construed to permit of the order without a hearing, and thus the sole question is its constitutionality and its constitutionality turns upon the question of a deprivation of property without compensation or otherwise without due process. The existence of the property right thus becomes pivotal.

We think the bill should be dismissed.

[File endorsement omitted.]

260 In United States District Court

In Equity No. 1012

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., PLAINTIFFS

vs.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Final decree

Filed June 26, 1933

Before the Honorable J. Whitaker Thompson, United States circuit judge, Honorable Oliver B. Dickinson, United States district judge, and Honorable John P. Nields, United States district judge, sitting pursuant to provisions of an act of Congress known as Urgent Deficiencies Act (38 Stat. L. 220) approved October 22, 1913.

This cause came on for hearing on motion of plaintiffs for a temporary injunction, on the 28th day of February, 1933, when came and appeared plaintiffs by their solicitors, the defendant, United States of America, and the defendant, Interstate Commerce Commission, by their solicitors, and Inland Waterways Corporation, American Barge Line Company, Mississippi Valley Barge Line Company, and Mississippi Valley Association, interveners, by their solicitors, and it appearing that said defendants and interveners had filed their answers herein, this cause was taken up and considered by the court upon the evidence submitted by plaintiffs, defendants, and interveners, and after oral argument before the court the cause was briefed by counsel for plaintiffs, defendants, and interveners.

Thereafter, by stipulation filed in this court on the 14th day of April, 1933, and signed by solicitors for plaintiffs, defend-
261 ants, and interveners, it was agreed that the hearing on plaintiffs' motion for a temporary injunction should be considered by the court as a final hearing on the merits; that no further evidence should be taken or introduced by either the plaintiffs, the

defendants, or interveners, and that a final decree should be entered by the court on the pleadings and record then before the court.

Upon consideration whereof the court being fully advised in the premises, and having filed in this cause its findings of fact and conclusions of law, do find in accordance with its written opinion filed in said cause on the 14th day of June, 1933, that the plaintiffs are entitled to the relief prayed for in their bill of complaint.

It is therefore accordingly ordered, adjudged, and decreed by the court:

1. That the order of the Interstate Commerce Commission entered the 10th day of December, 1932, in cause Ex Parte No. 102, Application of American Barge Line Company, a copy of which is attached to the bill of complaint as Exhibit No. "A", be, and the same is hereby, set aside and annulled;

2. That the United States of America and the Interstate Commerce Commission, and each of them, their officers and agents, be and they are perpetually enjoined from enforcing or attempting to enforce said order of the Interstate Commerce Commission or any of the terms or parts thereof.

June 26, 1933.

By the court:

(Sgd.) J. WHITAKER THOMPSON,
United States Circuit Judge.
(Sgd.) O. B. DICKINSON,
United States District Judge.
(Sgd.) JOHN P. NIELDS,
United States District Judge.

262 Approved (as to form):
(Sgd.) E. ENNALLS BERL,
(Sgd.) ELMER A. SMITH,
(Sgd.) R. S. OUTLAW,
(Sgd.) H. H. LARIMORE,
Solicitors for plaintiffs.
(Sgd.) ELMER B. COLLINS,
Special Assistant to the Attorney General,
Counsel for United States of America, defendant.
(Sgd.) H. L. UNDERWOOD,
Of counsel for Interstate Commerce Commission, defendant.
(Sgd.) A. K. SHIPE,
(Sgd.) JOHN J. ESCH,
Of counsel for American Barge Line Company, Mississippi Valley Barge Line Company, and Mississippi Valley Association, intervening defendants.
(Sgd.) CLARK C. WREN,
Of counsel for Inland Waterways Corporation, intervening defendant.

[File endorsement omitted.]

263 In United States District Court

[Title omitted.]

Petition for appeal

Filed Aug. 9, 1933

The United States of America and Interstate Commerce Commission, defendants, and American Barge Line Company, Inland Waterways Corporation, Mississippi Valley Barge Line Company, and The Mississippi Valley Association, intervening defendants, in the above-entitled cause, feeling themselves aggrieved by the final decree of the District Court of the United States for the District of Delaware, entered in said court June 26, 1933, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein they consider the decree erroneous are set forth in the assignment of errors, accompanying this petition and to which reference is hereby made.

Said defendants pray that a transcript of record, proceedings, and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated August 9, 1933.

(Sgd.) ELMER B. COLLINS,
Solicitor for the United States of America.
(Sgd.) H. L. UNDERWOOD,
Solicitor for Interstate Commerce Commission.
(Sgd.) CLARK C. WREN,
Solicitor for Inland Waterways Corporation.
(Sgd.) JOHN J. ESCH,
(Sgd.) A. K. SHIPE,
Solicitors for American Barge Line Company, Mississippi Valley Barge Line Company, The Mississippi Valley Association.

264 [File endorsement omitted.]

265 In the United States District Court

[Title omitted.]

Assignment of errors

Filed Aug. 9, 1933

Now come the United States of America and Interstate Commerce Commission, defendants, and Inland Waterways Corporation, American Barge Line Company, Mississippi Valley Barge Line Company,

and The Mississippi Valley Association, intervening defendants, by their respective counsel, and in connection with their appeal, file the following assignment of errors upon which they will rely in the prosecution of their appeal to the Supreme Court of the United States from the final decree of this court entered June 26, 1933.

The District Court erred:

1. In holding and deciding that section 3 (e) of the Inland Waterways Corporation Act, as amended, U.S. Code, title 49, c. 5, section 153 (e), in authorizing the Interstate Commerce Commission to establish joint rail and water rates without hearing or evidence, constitutes a delegation of pure legislative authority contrary to the provisions of article I, section 1, of the Constitution of the United States.

266 2. In holding and deciding that section 3 (e) of the Inland Waterways Corporation Act, as amended, in authorizing the entry of an order and compliance therewith, without hearing, denies the parties the right to a judicial review of such order and that such action is arbitrary and unreasonable and in violation of the fifth amendment to the Constitution of the United States.

3. In holding and deciding that the constitutional right of plaintiffs to a full and fair hearing is not complied with by the provision in said section 3 (e) for a subsequent hearing upon the filing of a complaint as provided for and specified in said section.

4. In holding and deciding that the action of the Interstate Commerce Commission in denying plaintiffs' petitions for a hearing and in requiring joint rail and water rates to be established without such a hearing or opportunity to be heard constituted a denial of due process of law, in violation of the fifth amendment to the Constitution of the United States.

5. In not holding and deciding that the provisions of section 3 (e) of the Inland Waterways Corporation Act was a valid and constitutional exercise of the power of Congress.

6. In not holding and deciding that the provision in said section 3 (e), requiring the Interstate Commerce Commission to proceed to a hearing upon the filing of a complaint by an aggrieved carrier, satisfied the due process clause of the fifth amendment.

7. In not holding and deciding that the plaintiffs had failed to exhaust their administrative remedies and that such failure barred the granting of the relief which they sought by their bill.

267 8. In not holding and deciding that no legal rights of the plaintiffs are affected or threatened by the said order of the Interstate Commerce Commission.

9. In not holding and deciding that plaintiffs failed to allege and prove that any legal injury resulted or would result from the order of the Commission.

10. In entering a decree setting aside the order of the Interstate Commerce Commission and enjoining the enforcement of said order.

11. In not dismissing the bill of complaint.

Dated August 9, 1933.

(Sgd.) ELMER B. COLLINS,
Solicitor for United States of America.
(Sgd.) H. L. UNDERWOOD,
Solicitor for Interstate Commerce Commission.
(Sgd.) CLARK C. WREN,
Solicitor for Inland Waterways Corporation.
(Sgd.) JOHN J. ESCH,
(Sgd.) A. K. SHIPE,
Solicitors for American Barge Line Company, Mississippi Valley Barge Line Company, The Mississippi Valley Association.

[File endorsement omitted.]

268 In United States District Court

[Title omitted.]

Order allowing appeal

Filed Aug. 9, 1933

In the above-entitled cause the United States of America, Interstate Commerce Commission, defendants, and Inland Waterways Corporation, American Barge Line Company, Mississippi Valley Barge Line Company, and The Mississippi Valley Association, intervening defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final decree of this court in this cause entered June 26, 1933, and having also made and filed an assignment of errors, and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of court in such case made and provided, it is

Ordered and decreed that the appeal be, and the same is hereby, allowed as prayed for.

(Sgd.) JOHN P. NIELDS,
United States District Judge.

Dated August 9, 1933.

[File endorsement omitted.]

269 In United States District Court

[Title omitted.]

Notice to attorney general of the State of Delaware

Filed Aug. 16, 1933

To Honorable PERCY WARREN GREEN,
Attorney General of the State of Delaware:

Pursuant to Urgent Deficiencies Act of October 22, 1913, 38 Stat. 221, you are hereby notified that the defendants, United States of

America and Interstate Commerce Commission, and the intervening defendants, Inland Waterways Corporation, American Barge Line Company, Mississippi Barge Line Company and The Mississippi Valley Association, have taken an appeal to the Supreme Court of the United States from the final decree of the United States District Court, entered June 26, 1933, and the order allowing the appeal makes the same returnable within forty days from the date hereof.

(Sgd.) ELMER B. COLLINS,
Solicitor for the United States.
(Sgd.) H. L. UNDERWOOD,
Solicitor for Interstate Commerce Commission.
(Sgd.) CLARK C. WREN,
Solicitor for Inland Waterways Corporation.

270

(Sgd.) JOHN J. ESCH,
(Sgd.) A. K. SHIPE,
Solicitors for American Barge Line Company, Mississippi Valley Barge Line Company, The Mississippi Valley Association.

Service of a copy of the foregoing notice is hereby acknowledged this 16th day of August 1933.

(Sgd.) PERCY WARREN GREEN,
Attorney General, State of Delaware.

271 [Citation in usual form showing service on E. Ennalls Berl, filed Aug. 9, 1933, omitted in printing.]

272 [Omitted.]

273 In United States District Court

[Title omitted.]

Pracipe for transcript of record

Filed Aug. 9, 1933

To the CLERK:

Please prepare a transcript of the record in the above-entitled cause for the purposes of the appeal herein filed and allowed, including therein the following papers and proceedings, to wit:

1. Bill of complaint and exhibit A thereto attached.
2. Answer of United States of America.
3. Answer of Interstate Commerce Commission and exhibits A, B, and C thereto attached.
4. Petition of Inland Waterways Corporation for leave to intervene and order allowing intervention.
5. Answer of Inland Waterways Corporation.
6. Petition of American Barge Line Company for leave to intervene and order allowing intervention.

7. Answer of American Barge Line Company.*
8. Petition of Mississippi Valley Barge Line Company for leave to intervene and order allowing intervention.
9. Answer of Mississippi Valley Barge Line Company.*
10. Petition of The Mississippi Valley Association for
274 leave to intervene and order allowing intervention.
11. Answer of The Mississippi Valley Association.*
12. Affidavits of J. R. Staley, O. M. Meyne, J. P. Patterson, S. C. Matthews, and Robert D. Reeves, submitted by plaintiffs.
13. Affidavits of George A. Casey and T. Q. Ashburn, submitted by defendants.
14. Plaintiffs' exhibits A, B, C, D, E, F, G, H, I, and J.
15. Stipulation that cause may be taken as submitted on final hearing.
16. Opinion of District Court.
17. Concurring opinion of District Judge Nields.
18. Dissenting opinion of District Judge Dickinson.
19. Findings of fact and conclusions of law of District Court.
20. Final decree.
21. Petition for appeal.
22. Assignment of errors.
23. Order allowing appeal.
24. Notice to Attorney General of the State of Delaware.
25. Citation on appeal.
26. Statement of jurisdiction of Supreme Court, together with notice and acknowledgment of service.
27. Præcipe for record.

(Sgd.) John J. Esch, (sgd.) A. K. Shipe, Solicitors for American Barge Line Company, Mississippi Valley Barge Line Company, the Mississippi Valley Association; (sgd.) Elmer B. Collins, Solicitor for United States of America; (sgd.) H. L. Underwood, Solicitor for Interstate Commerce Commission; (sgd.) Clark C. Wren, Solicitor for Inland Waterways Corporation.

275 Service of a copy of the above præcipe for transcript of record is hereby acknowledged this 9th day of August 1933.

(Sgd.) E. ENNALLS BERL,
Solicitor for Plaintiffs-Appellees.

[File endorsement omitted.]

276 [Clerk's certificate to foregoing transcript omitted in printing.]

277 In Supreme Court of the United States

Statement of points to be relied upon and designation of the record to be printed

Filed Sept. 5, 1933

Come now the appellants and say that they will rely on the following points in brief and oral argument before this court on their appeal in the above-entitled cause:

1. The construction given section 3 (e) of the Inland Waterways Corporation Act by the Interstate Commerce Commission was correct and consonant with the purpose and intent of Congress in the enactment of that section.

2. The Commission in this case followed the procedure ordained by the statute, and its action was in all respects in full accord with the statute.

3. The statute as construed and applied by the Commission is within the competency of Congress and violates no constitutional provision or guaranty.

4. The district court erred in deciding that the statute was unconstitutional.

5. The plaintiffs (appellees) have no standing to attack the validity or constitutionality of the statute, since they did not
278 and have not availed themselves of the opportunity for a hearing which the statute provides, and thus have failed to exhaust their administrative remedies.

6. No legal rights of the plaintiffs (appellees) are threatened or affected by the order of the Interstate Commerce Commission challenged in this case; plaintiffs have failed to allege or prove that any such injury resulted or would result from that order. Hence they have no basis for their bill of complaint.

Appellants further state that the entire record in this cause as filed in this court is necessary for consideration of the points set forth above.

J. CRAWFORD BIGGS,
Solicitor General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
H. L. UNDERWOOD,
Solicitor for Interstate Commerce Commission.
CLARK C. WREN,
Solicitor for Inland Waterways Corporation.
JOHN J. ESCH,
A. K. SHIPE,
Solicitors for American Barge Line Company, Mississippi Barge Line Company, The Mississippi Valley Association.

Service of a copy of the above statement of points to be relied upon and designation of the record to be printed is hereby acknowledged this ——— day of ————, 1933.

———— ————,
Solicitor for appellees.

279 [File endorsement omitted.]

U.S. GOVERNMENT PRINTING OFFICE: 1933